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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

THE DOW CHEMICAL COMPANY, et al.,

Petitioners,

v.

MICHAEL RYAN, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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Questions Presented

I. Whether the holding of the Court of Appeals that pretrial discovery is presumptively open to the public is in conflict with this Court's ruling in *Seattle Times Co.* v. *Rhinehart*, 467 U.S. 20 (1984)?

II. Whether the Court of Appeals erred in creating a public right, under Federal Rules of Civil Procedure 26(c) and 5(d), to examine any discovery materials in any case, without any showing of need, regardless of whether the case has any merit, and regardless of the time of the request?

III. Whether the decision of the Court of Appeals affirming the modification of the protective orders and the settlement agreement in a manner that (a) will make it more difficult for courts to assist the gathering of evidence and (b) will discourage settlements, sanctions such a departure from the usual course of proceedings as to call for an exercise of this Court's power of supervision?

Parties Below

The parties to the proceeding below, as required by Supreme Court Rules 21.1 and 28.1 are listed in the following footnote.[1]

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[1] Michael F. Ryan and other named plaintiffs as class representatives, respondents.

The class of all persons who were in the United States, New Zealand or Australian Armed Forces injured while in or near Vietnam by exposure to Agent Orange or other phenoxy herbicides, including those compounds composed in whole or in part of 2,4,5-trichlorophenoxyacetic acid or containing some amount of 2,3,7,8-tetrachlorodibenzo-p-dioxin. The class also includes spouses, parents and children of the veterans born before January 1, 1984, directly or derivatively injured as a result of the exposure, respondents.

Vietnam Veterans of America, appearing as *amicus curiae,* respondent.

The Dow Chemical Company, petitioner. The parent company, subsidiaries and affiliates of The Dow Chemical Company are as follows:

> Alamo Land Company, Inc., Compagnie des Services, Dowell Schlumberger, Cordis Dow Corporation, Dow Banking Corporation, Dow Scandia Banking Corporation, Ltd., Dow Chemical Iberica S.A., Dow Corning Corporation, Dowell Schlumberger Corporation, El Dorado Terminals Company, Gruppo Lepetit S.p.A., Ivon Watkins-Dow Limited, Joliet Marine Terminal, Ecuatorianos LIFE, Long Beach Marine Terminal, Oronzio de Nora Impianti Elettrochimici, S.A., Pacific Chemicals Berhad, Sinor Corradini Navarra S.A., Societe Industrielle de Plastic et de L'acier S.A., Technovast, The Cynara Company, The Kartridg Pak Co.

Diamond Shamrock Chemicals Company, petitioner. The parent company, subsidiaries (except wholly-owned subsidiaries) and affiliates of Occidental Electrochemicals Corporation (formerly named Diamond Shamrock Chemicals Company) are as follows:

> Occidental Petroleum Corporation, Occidental Petroleum Investment Co., Occidental Chemical Holding Corporation, Oxy-Diamond Alkali Corporation, Canadian Occidental Petroleum Ltd., Occidental Chemical Corporation, Carboclora S.A. Industries Quimicas, Korea Pottasium Chemical

(footnote continued on following page)

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Co. Ltd., Thai Diamond Shamrock Chrome Limited, Thai Diamond Shamrock Limited, Sanital Comercio e Empreendimentos, Petway Products Distributors, Inc., International Ore & Fertilizer Belgium SA, Oxy Metal Industries (France) SA, OxyTech Systems, Inc., Plasticos y Derivados Compania Anonima, Plastiflex, C.A., Malharia Industrial do Nordeste SA, Industries Oxy S.A., Sumitomo Durez Co. Ltd., Industries Quimica de Portuquesa SA, Mississippi Chemical Corporation, Occidental Minerals (Philippines) Inc., Tororo Industrial Chemicals & Fertilizers Limited, Trans-Jeff Chemical Corporation, Distribuidora y Exportadora Udylite, S.A.

Hercules Incorporated, petitioner. The parent company, subsidiaries and affiliates of Hercules Incorporated are as follows:

A.C. Hatrick Chemicals Pty. Ltd., A.C. Hatrick, (N.Z.) Ltd., A/S Kobenhavens Pektinfabrik (CPF), A/S Kobenhavens Pektin Fabrik, Abieta Chemie GmbH, AEONIC Systems, Inc., Algas Marinas S.A., Alkyls do Brasil Ltds., Aqualon Company, Austchem Nominees Pty. Ltd., Australian Chemical Holdings Ltd., BHC Laboratories, Inc., Caribbean Lumber Co., Centennial Lumber Company, Ceratonia, S.A., Cesalpinia, S.p.A., Champlain Cable Corporation, Compania Brasil Eira De Productos, Curtis Bay Insurance Co. Ltd., Dawood Hercules Chemical Ltd., Devron Hercules Inc., DIC-Hercules Chemicals Inc., EKC Technology, Inc., Electronic Display Systems, Inc., EPICOR Laboratories, Inc., Genu Products Canada Limited, Genu Products Philippines Inc., Hafimij B.V., Hercochem (H.K.) Ltd., Hercofina Europe V.O.F., Hercofina Joint Venture, Hercoform Incorporated, Hercoform Marketing Inc., Hercules Aerospace Espana, S.A., Hercules Andino S.A., Hercules Canada, Inc., Hercules Chemical Corporation, Hercules Chemicals Investments Pty. Ltd., Hercules Chemicals B.V., Hercules Credit Inc., Hercules de Centro America S.A., Hercules Defense Electronic Systems, Inc., Hercules Do Brasil Productos Quimicos Ltd., Hercules Far East Ltd., Hercules Finance Co. Ltd., Hercules France S.A., Hercules GmbH, Hercules (Holdings) Ltd., Hercules International Trade Corporation, Hercules International Trade Corporation, Hercules Islands Corporation, Hercules Kemiska Aktiebolag, Hercules Ltd., Hercules Overseas Corporation, Hercules Taiwan Co. Ltd., Hercules Trading Corporation, Herdillia Chemicals Ltd., Hersean PTE Ltd., Himont Incorporated, Himont U.S.A., Inc., Holden Vale Mfg. Co. Ltd., Infinetics, Inc., Inmobilaria Petrocel, Intermarine USA, Lexteco Inc., Mathersa Industries Quimicas, S.A., MICA Cor-

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poration, MICA TEK Sales, Inc., MICRON Sales Inc., Oy Hercofin Ab, NFW (Australia) Pty. Ltd. PFW (Deutschland) B.V. & Co. Aromen, PFW (Leasing) B.V., PFW Ltd., PFW (Nederland) B.V., PPD Hercules, Inc., P.T. Hercules Mas Indonesia, Patex Chemie GmbH, Etichem S.A., Petrocel S.A., Polo Industria E Commercia Ltda., Pomosin AG, Quimica Hercules De Colombia Limited, Quimica Hercules S.A. de C.V., Quimproc, S.A., Rika Hercules Inc., Rohe, S.A. Ross Pulp & Paper, Inc., Semi-Gas Systems, Inc., Simmonds Industries Inc., d/b/a Cooperative Industries Inc., Simmonds Precision AG, Simmonds Precision Engine Systems, Simmonds Precision Ltd., Simmonds Precision Motion Controls, Inc., Simmonds Precision NV, Simmonds Precision Products Inc., Solteco Inc., St. Croix Petrochemical Corp., Sumika-Hercules Co. Ltd., Taiwan Hercules Chemicals, Inc., Taloquimia, S.A., Teratec Systems Inc., Texas Alkyls Belgium, S.A., Texas Alkyls Inc., Viny, Ltd.

Monsanto Company, petitioner. The parent company, subsidiaries and affiliates of Monsanto Company are as follows:

ACM Services, Inc., Advent Eurofund Limited, Agerquim, S.A. de C.V., Australian Fluorine Chemicals Pty. Limited, Biogen N.V., Collagen Corporation, Companhia Brasileira de Estireno (CBE), Companhia Brasileira de Plasticos Monsanto, Control Specialists (Proprietary) Limited, Daishin Kogyo K.K., Goyana, S.A. Industrias Brasileiras de Materias Plasticas (GOYANA), Hydrocarbon Products Pty. Ltd., Industrias Resistol, S.A. (IRSA), K.K. Astro-Gelande, Kibi Kasei K.K., Korag Company Limited, Korsil Company, Ltd., Mitsubishi Monsanto Chemical Company (MMK), Monsanto Chemicals of India Limited (MCIL), Monsanto (Malaysia) Sdn. Berhad (MONNAYSIA), Nippon Cooper Kabushiki Kaisha, Nippon Fisher Company, Ltd., Plagon S.A.—Plasticos Goyana do Nordeste, Revertex Industries (Aust.) Pty. Ltd., Revertex Industries (N.Z.) Ltd., Revinex Australia Limited, Sankyo Kasei Sangyo K.K., Soperton Gum Market, Inc., Taiyo Kogyo Kabushiki Kaisha, 102957 Canada Limited, Titan Chemicals Limited.

T H Agriculture & Nutrition Company, Inc., petitioner. The parent company, subsidiaries and affiliates of T H Agriculture & Nutrition Company are as follows:

North American Philips Corporation

Thompson Chemicals Corporation, petitioner.

Uniroyal, Inc., a corporation dissolved pursuant to the laws of the State of New Jersey, petitioner.

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Petitioners The Dow Chemical Company, Diamond Shamrock Chemicals Company, Hercules Incorporated, Monsanto Company, T H Agriculture and Nutrition Company, Inc., Thompson Chemicals Corporation and Uniroyal, Inc. respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in *In re "Agent Orange" Product Liability Litigation* on June 10, 1987.

Opinions Below

The protective order dated February 6, 1981 is reprinted in the Appendix at 1a.

The Special Master's Memorandum Opinion and Protective Order dated October 14, 1982 is reprinted in the Appendix at 7a.

The decision of the United States District Court for the Eastern District of New York affirming the issuance of the

protective order of October 14, 1982 is published at 96 F.R.D. 582 (E.D.N.Y. 1983) and reprinted in the Appendix at 15a.

The order of Magistrate Shira A. Scheindlin lifting the protective orders and the memorandum and order of the United States District Court for the Eastern District of New York affirming Magistrate Scheindlin's order are published at 104 F.R.D. 559 (E.D.N.Y. 1985) and reprinted in the Appendix at 26a.

The opinion of the United States Court of Appeals for the Second Circuit affirming the district court's order was issued on June 10, 1987, is not yet published, and is reprinted in the Appendix at 63a.

The order of the Court of Appeals for the Second Circuit denying defendants' petition for rehearing was issued on July 17, 1987 and is reprinted in the Appendix at 82a.

The order of the Court of Appeals staying issuance of the mandate pending petition for certiorari is reprinted in the Appendix at 83a.

Jurisdiction

The judgment of the Court of Appeals for the Second Circuit was entered on June 10, 1987. Defendants' petition for rehearing or rehearing en banc was denied in an order dated July 17, 1987. On July 17, 1987, the Court of Appeals stayed the issuance of the mandate until August 7, on the condition that a petition for writ of certiorari be filed on or before that date. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Statutes and Rules

The case concerns Rules 26(c) and 5(d) of the Federal Rules of Civil Procedure.

Rule 26(c) provides:

> (c) Protective Orders. Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court in which the action is pending or alternatively, on matters relating to a deposition, the court in the district where the deposition is to be taken may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: (1) that the discovery not be had; (2) that the discovery may be had only on specified terms and conditions, including a designation of the time or place; (3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery; (4) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters; (5) that discovery be conducted with no one present except persons designated by the court; (6) that a deposition after being sealed be opened only by order of the court; (7) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way; (8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court.
>
> If the motion for a protective order is denied in whole or in part, the court may, on such terms and conditions as are just, order that any party or person provide or permit discovery. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion.

Rule 5(d) provides:

> (d) Filing. All papers after the complaint required to be served upon a party shall be filed with

> the court either before service or within a reasonable time thereafter, but the court may on motion of a party or on its own initiative order that depositions upon oral examination and interrogatories, requests for documents, requests for admission, and answers and responses thereto not be filed unless on order of the court or for use in the proceeding.

Statement of the Case

This case arose out of the controversy over the alleged effects of the United States military's use of phenoxy herbicides to defoliate portions of the jungles of Vietnam during the Vietnam conflict. Plaintiffs, former members of the United States, Australia and New Zealand armed forces who served in Vietnam, claimed that they had been injured by phenoxy herbicides, commonly known as "Agent Orange," that were manufactured by the petitioners pursuant to contracts with the government. This proceeding is comprised of numerous cases that were transferred to the United States District Court for the Eastern District of New York for coordinated or consolidated pretrial proceedings pursuant to 28 U.S.C. § 1407 and designated as MDL No. 381. The cases were certified as a class action in 1983. *In re "Agent Orange" Product Liability Litigation,* 100 F.R.D. 718 (E.D.N.Y. 1983).

Shortly before the scheduled trial, the class action was settled. The district court upheld the fairness of the settlement and the United States Court of Appeals for the Second Circuit affirmed the class settlement on April 21, 1987. *In re "Agent Orange" Product Liability Litigation,* 818 F.2d 145 (2d Cir. 1987). In affirming the class settlement, the court characterized the settlement as "essentially a payment of nuisance value" that was fair because "the plaintiffs' case was so weak as to be virtually baseless" and because the district court had expressed "skepticism about

whether the case should ever have been brought." *Id.* at 151. The court also described the plaintiffs' case as a form of "public protest at the perceived national indifference to Vietnam Veterans" and an attempt to receive " 'larger remedies and emotional compensation' that were beyond its [the court's] power to award." *Id.* at 148, quoting *In re "Agent Orange" Product Liability Litigation,* 597 F. Supp. 740, 747 (E.D.N.Y. 1984).

This petition concerns attempts by non-parties to the litigation to acquire, for purposes of public dissemination, documents that were produced by defendants-petitioners under protective orders issued by the district court.

During discovery, several protective orders were issued. On February 6, 1981, then district judge George C. Pratt issued an order allowing the defendants to designate as "confidential" any records that contained "confidential developmental, business, research or commercial information." Appendix at 1a. The order required any party receiving documents designated as "confidential" to refrain from disclosing them and to file them with the district court under seal, if filing was required. The documents were to be returned or destroyed at the end of the litigation. *Id.* at 2a, 6a.

On October 14, 1982, Special Master Sol Schreiber issued a protective order limiting disclosure of all discovery materials. *In re "Agent Orange" Product Liability Litigation,* 96 F.R.D. 582, 585 (E.D.N.Y. 1982). No party to the litigation filed objections to the Special Master's order. *Id.* at 583. However, a non-party, CBS, Inc., objected, and the district court affirmed the order. In his opinion affirming the protective order, Judge Pratt reasoned that non-parties have no right of access to materials produced in discovery but not made part of the public record. *Id.* at 584.

Judge Pratt further reasoned that the protective order was needed to prevent prejudicial pretrial publicity and to permit discovery to proceed more expeditiously. *Id.* at 583, 585.

After the class action was settled, the Vietnam Veterans of America ("VVA"), a non-party appearing as an *amicus curiae*, requested access to all the "Agent Orange" discovery materials. Chief Judge Jack B. Weinstein advised counsel for the VVA to file a motion returnable before Magistrate Shira A. Scheindlin. The VVA served a motion seeking access to discovery materials on August 31, 1984, and the Agent Orange Plaintiffs' Management Committee and Victor Yannacone, Jr., attorney for certain plaintiffs, joined in the VVA's motion. In response to this motion, Magistrate Scheindlin determined that the protective orders should be lifted and that all the fruits of discovery should be open to the public. Defendants appealed, and Judge Weinstein affirmed the magistrate's ruling. *In re "Agent Orange" Product Liability Litigation,* 104 F.R.D. 559 (E.D.N.Y. 1985). Judge Weinstein stayed his order "pending final disposition of appeals from [the district] court's final approval of the 'Agent Orange' class action settlement." *Id.* at 562.

On June 10, 1987, the Court of Appeals for the Second Circuit affirmed Judge Weinstein's order lifting the protective orders. The court reasoned that Federal Rules of Civil Procedure 26(c) and 5(d) give the public a presumptive right of access to all discovery materials. The defendants petitioned for a rehearing or a rehearing en banc and that petition was denied on July 17, 1987.

Reasons For Granting the Writ

I.

Certiorari Should Be Granted Because the Decision Below Is in Conflict With the Decision of This Court in *Seattle Times Co.* v. *Rhinehart.*

In *Seattle Times Co.* v. *Rhinehart,* 467 U.S. 20 (1984), this Court rejected a line of lower federal court cases that had suggested that the public has a right of access to pretrial discovery materials. The decision below attempts, with a slightly different rationale, to resurrect the principles that this Court so clearly rejected in *Seattle Times.* In *Seattle Times* this Court was faced with the issue of whether "a litigant's freedom comprehends the right to disseminate information that he has obtained pursuant to a court order that both granted him access to that information and placed restraints on the way in which the information might be used." *Id.* at 32. The Court held that a litigant does not have an "unrestrained right to disseminate information obtained through pretrial discovery." *Id.* at 30. The court below was also faced with the issue of public dissemination of discovery materials produced under a protective order, but reached the opposite conclusion, holding that discovery materials are "presumptively open to the public." Appendix at 75a.

The conflict between the *Seattle Times* Court and the court below goes to the very heart of the way trial courts should view protective orders. To determine what showing the proponent of a protective order must make to avoid public disclosure, both courts needed to decide whether public access should be the general rule or an exception to the rule. This Court in *Seattle Times* resolved that issue by stating that "pretrial depositions and interrogatories are

not public components of a civil trial . . . and, in general, they are conducted in private." *Seattle Times,* 467 U.S. at 33, citing *Gannett Co.* v. *DePasquale,* 443 U.S. 368, 396 (1979) (Burger, concurring). By contrast, the court below resolved that question by stating that "the public has a presumptive right of access." Appendix at 76a. The confusion that this conflict will cause in the trial courts can only be prevented by a decision by this Court.

Moreover, the conflict between *Seattle Times* and the decision below goes beyond the issue of public access and centers on the very nature of the discovery process. The *Seattle Times* Court noted that discovery is permitted "for the sole purpose of assisting in the preparation for trial." *Seattle Times,* 467 U.S. at 34. The decision below authorizes use of discovery materials by non-parties for purposes unrelated to any litigation. The *Seattle Times* Court described use of discovery to gather information for public release as an "abuse of its [a court's] processes." *Seattle Times,* 467 U.S. at 36. The decision below suggests that such use of discovery material is presumptively permitted. Appendix at 75a. The *Seattle Times* Court stated that Rule 26(c) must be read as a response to the breadth of Rule 26(b); Rule 26(c) is thus designed to prevent the abuses that Rule 26(b) might otherwise permit. *Seattle Times,* 467 U.S. at 34-35. The decision below looked solely at Rule 26(c) to find that the Rule is designed to provide public access. Appendix at 75a-76a. These fundamental disputes about the nature of the discovery process are so central to our civil litigation system that this Court must act to resolve the conflict.

II.

The Unprecedented Interpretation of Rule 26(c) Set Forth in the Decision Below Would Permit Any Member of the Public to Review and Disseminate Documents Produced by Any Party to a Litigation Without Any Showing of Need, Regardless of Whether the Case Has Any Merit and Regardless of the Time of the Request.

The decision below creates a presumptive public right of access to all discovery materials. The effect of the decision is to create a freedom of information act, applicable to all litigants. The idea that any person can enter any court and force any litigant to expend the time and money to provide access to documents produced in discovery is so foreign to the Federal Rules as to require this Court's intervention.

A. The Decision Below Is Likely to Encourage the Bringing of Frivolous Suits for the Sole Purpose of Gathering Information.

The decision below is likely to encourage the sorts of abuses that Rule 26(c) is designed to prevent. The *Seattle Times* Court suggested that bringing a lawsuit in order to gather information to disseminate to the public is an abuse of process. *Seattle Times*, 467 U.S. at 36. Not only will that be permissible under the decision below, this may well be such a case. The Court of Appeals recognized that the "Agent Orange" lawsuits were, to many plaintiffs, a form of "public protest at perceived national indifference to Vietnam Veterans." 818 F.2d at 148. That description of the case, combined with the trial court's conclusion that "plaintiff's case [was] so weak as to be *virtually baseless*," *id.* at 151 (emphasis added), indicates that this case may be precisely the sort of abuse the *Seattle Times* Court said Rule 26(c) is designed to prevent.

In an era in which the federal courts are overburdened and the Federal Rules have recently been amended to strengthen the sanctions against abuse of the discovery process, this Court should not permit the existence of a decision that will encourage the bringing of frivolous litigation for purposes of gathering information. The decision below is especially anomalous when compared with the rule that one cannot use discovery to find a lawsuit. Numerous courts have held that it is improper to use discovery to find a lawsuit. *See, e.g., Segal* v. *Gordon*, 467 F.2d 602, 607-08 (2d Cir. 1972); *United States* v. *City of Philadelphia*, 644 F.2d 187, 204-06 (3d Cir. 1980). In both cases, defendants claimed that plaintiffs' allegations were not specific enough to respond to, and plaintiffs responded by claiming that they could not be more specific without discovery. Discovery was denied on the ground that discovery is designed to help prove a wrong, not to find one. *Id.* Because the rules of procedure were designed to serve the needs of litigation, it makes no sense to permit uses totally unrelated to litigation and, at the same time, prohibit the use of discovery to find a claim on which to base litigation.

Another anomaly created by the decision below is that while encouraging the bringing of frivolous litigation, it may also dissuade some from bringing meritorious claims. As the *Seattle Times* Court explained, if the public has access to all discovery materials, then any person who is concerned about privacy will be hesitant to bring suit. *Seattle Times*, 467 U.S. at 36-37 n.22. The Court noted that discovery, unlike trial evidence, is not limited to material that is relevant to the suit, and if bringing a suit requires one to make all discovery material public, "[t]he judicial system will thus have made the utilization of its remedies so onerous that people will be reluctant or unwilling to use it." *Id.*

The error made by the Court of Appeals is based on its misapplication of this Court's decision in *Seattle Times*. The *Seattle Times* Court saw the breadth of discovery under Rule 26(b) as a potential for abuse and Rule 26(c) as the remedy for that abuse. *Seattle Times*, 467 U.S. at 34-35. The court below saw all Rule 26(b) discovery as presumptively appropriate and Rule 26(c) protective orders as a threat to one's rights under 26(b). The decision below is thus based on the Court of Appeals' failure to apply Rule 26(c) in accordance with this Court's decision in *Seattle Times*.

This Court's directions on how to interpret the Federal Rules underscore how far the court below has departed from the usual course of judicial proceedings. Rule 1 of the Federal Rules of Civil Procedure directs courts to interpret the rules "to secure the just, speedy and inexpensive determination of every action." The court below has fashioned a rule that does the opposite. It permits non-parties to delay litigation through requests for access to discovery materials, increasing the costs of litigation and the court time required to handle it, for purposes totally unrelated to a just determination of any action.

The damage to the judicial system that is likely to result from the decision below should move the Court to grant the writ and reverse the decision below.

B. The Court of Appeals Interpreted Rule 5(d) in a Manner That So Far Departs From the Accepted and Usual Course of Judicial Proceedings as to Call for an Exercise of This Court's Power of Supervision.

The decision below that Rule 5(d) also makes discovery materials public is a serious misreading of Rule 5(d) that would impair the civil discovery system. Rule 5(d) states

that all "papers" that are "required to be served upon a party" must be filed. There is a distinction between materials that are filed with a court and thus may be public and those that are not filed with a court and thus are presumed to be private. *See, e.g., Ball Memorial Hospital, Inc.* v. *Mutual Hospital Insurance, Inc.*, 784 F.2d 1325, 1346 (7th Cir. 1986). There is no question that documents produced pursuant to Rule 34 are neither "papers" nor "required to be served."

Federal Rule of Civil Procedure 11 requires that every "paper of a party represented by an attorney be signed by at least one attorney of record." Because no one has ever suggested that documents produced in discovery must be signed pursuant to Rule 11, it is clear that they are not "papers." Moreover, Rule 7(b)(2) states that "rules applicable to captions . . . apply to all motions and papers provided for by these rules." Again, no one has ever suggested that all documents produced in discovery need a case caption. Indeed, the signing and captioning of all documents would serve no purpose and greatly increase discovery costs.

Rule 34(b) makes clear that even if discovery documents were "papers," they are not "required to be served upon a party." Rule 34(b) describes the procedure for document production. It provides that documents are to be made available for inspection and copying. It does not require that they be served and, as a matter of course, they are not served. Therefore, they cannot be papers that are "required to be served" pursuant to Rule 5(d).

If the position of the Court of Appeals is allowed to stand, and all materials produced in discovery are "papers" under Rule 5(d), all such materials would have to be signed, captioned, served upon the other party and filed

in court. The fact that none of these procedures is followed demonstrates how far the court below has strayed from established judicial practice.

C. The Decision Below Is in Conflict With Other Federal Court of Appeals Decisions.

The interpretation of Rule 26(c) in the decision below is in conflict with the general rule that the Federal Rules do not confer rights on non-parties. *See, e.g., Spangler* v. *Pasadena City Board of Education*, 552 F.2d 1326, 1329 (9th Cir. 1977); *Martindell* v. *I.T.&T. Corp.*, 594 F.2d 291 (2d Cir. 1979). In *Spangler*, parents of school children sought to participate in a desegregation case and the court held that, unless they seek intervention under Rule 24, they cannot participate. If the Federal Rules do not provide rights to parents who had a clear interest in the outcome, then non-parties with no interest in the litigation surely have no rights under the Federal Rules.

The Court of Appeals for the Second Circuit had been at the forefront of the application of the principle that the Federal Rules do not grant rights to non-parties who do not intervene. A brief review of several of its decisions will demonstrate the extent of the conflict. In *Martindell*, the federal government sought access to discovery material in a private securities case, and the court held that the government, as a non-party, had no right to challenge the district court's protective orders. The court stated that the proper procedure for a non-party who wishes to have access to discovery materials is to seek to intervene under Rule 24(b). 594 F.2d at 294. Rule 24(b) permits intervention only if the non-party can show an interest that will be affected by the outcome of the litigation. Thus, the court recognized that non-parties have no right to discovery material under Rule 26 and that to gain access, a non-party

must demonstrate an interest in the litigation. The decision below is the exact opposite, *i.e.*, that non-parties with no interest in the litigation have a presumptive right of access under Rule 26.

In *United States* v. *Davis*, 702 F.2d 418 (2d Cir. 1983), the Court of Appeals again made clear that the public has no general right of access to discovery materials. In *Davis*, the government was successful in enforcing a grand jury subpoena that required a court to provide material produced under a civil protective order. The court distinguished *Martindell* by the manner in which the government sought the documents. In *Martindell* the government had sought the documents in the same manner that a private citizen would, while in *Davis* the government was using its investigative powers. *Id.* at 422. By drawing the distinction between government access and access by private citizens, the court reaffirmed the rule that members of the general public have no right of access.

In *H.L. Hayden Co.* v. *Siemens Medical Systems, Inc.*, 797 F.2d 85 (2d Cir. 1986), the Court of Appeals relied on *Martindell* to hold that non-parties cannot seek to modify protective orders without a showing that they have a significant interest in the litigation and that they "will significantly contribute . . . to the just and equitable adjudication of the legal questions presented." *Id.* at 88-89. The decision below permits a non-party with no showing of an interest in the litigation to gain access to the materials after the case was settled, when it is impossible for them to contribute to the just adjudication.

The conflict between the decision below and other federal court of appeals decisions requires a resolution by this Court, particularly because the decision below did not challenge those decisions and those decisions have been followed

by numerous federal trial courts. *See, e.g., Valentin* v. *Richardson,* 110 F.R.D. 622, 624 (D. Mass. 1986); *Rogers* v. *Proctor & Gamble Co.,* 107 F.R.D. 351, 353 (E.D. Mo. 1986).

III.

The Decision Below on Modification of Protective Orders and Modification of Class Settlements Sanctions Such a Departure From the Usual Course of Proceedings as to Call for an Exercise of This Court's Power of Supervision.

The court below applied the generally accepted rule on modification of protective orders in a manner that threatens the continued existence of the rule. The rule applied by the court is that a protective order that has been relied upon can only be modified upon a showing of "extraordinary circumstances" or "compelling need." Appendix at 79a. This rule benefits the judicial system by encouraging witnesses to be more forthcoming with testimony. *Martindell* v. *I.T.&T. Corp.,* 594 F.2d at 295. The court below found "extraordinary circumstances" in the fact that there might not have been good cause for granting the protective order. If a reexamination of good cause can be used to find "extraordinary circumstances," then no protective order can be relied upon. The court's application of the rule thus defeats the purpose of the rule.

The conclusion below that "extraordinary circumstances" can be found in a reexamination of "good cause" means that one who has already relied upon a protective order bears the burden of continuing to show "good cause" whenever a protective order is challenged. As noted above, "extraordinary circumstances" are required so that wit-

nesses will be encouraged to rely on protective orders. Keeping the burden of showing "good cause" forever on the proponent of protection, defeats the purpose of the rule because it makes the continued existence of a protective order less reliable. Thus, both the court's application of the "extraordinary circumstances" rule and its placement of the burden of proof threaten the continued vitality of the rule.

The results of the decision below are likely to include: hindering the gathering of evidence by making parties and witnesses hesitant to rely on protective orders, confusion among trial courts and parties concerning who has the burden and what the burden is, and frustration of trial judges who seek to use protective orders to further the gathering of evidence and to expedite discovery. These problems can only be prevented by this Court's assertion of jurisdiction and clarification of this area of the law.

The court below also found that the public interest in "Agent Orange" provides an alternative ground for disclosure. This use of the public interest is inconsistent with this Court's conclusion in *Gannett Co.* v. *DePasquale,* 443 U.S. 368 (1979), that our adversary system "is premised upon the proposition that the public interest is fully protected by the participants in the litigation." *Id.* at 383. This is even more true in the case of class actions where the trial judge must rule on the fairness of a settlement.

It is also important to recognize that the public interest is not implicated whenever some people may find information interesting. In *Gannett* the Court held that the public has a greater interest in criminal proceedings than in civil proceedings because the government is a party. In *Cox Broadcasting Corp.* v. *Cohen,* 420 U.S. 469, 491-92 (1975), the Court suggested that issues for which citizens

need information to vote or express their opinions to the government are also matters of public interest. And in *Seattle Times,* the Washington Supreme Court rejected the argument that the public interest compelled disclosure of newsworthy material. Noting that the information concerned a private individual and financial and membership data of a religious organization, the court concluded that none of the information would promote proper functioning of government agencies. 98 Wash.2d 226, 654 P.2d 673 (1982). Taken together, *Gannett, Cox* and *Seattle Times* indicate that where governmental proceedings are not implicated and the issue is one of purely historical interest upon which citizens will not have an opportunity to vote, the public interest does not compel disclosure. Thus, although "Agent Orange" is clearly newsworthy, that newsworthiness does not confer a public interest upon discovery materials that were not filed with the court.

The treatment of the class settlement by the court below will also create problems for litigants and the judicial system. The court refused to enforce paragraph 12 of the settlement agreement which required plaintiffs to return all discovery documents to the defendants. In so doing, the court deprived the defendants of a bargained-for right that they considered to be important, reasoning that defendants could not have viewed this as important because they did not attempt to be relieved from the settlement. This total disregard of what the parties intended will create a chilling effect on future settlements, to the detriment of both litigants and the judicial system.

Conclusion

For the reasons set forth above, petitioners respectfully pray that a writ of certiorari be granted to review the judgment of the Court of Appeals for the Second Circuit.

Dated: Uniondale, New York
August 7, 1987

Respectfully submitted,

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APPENDIX

Protective Order Regarding Production of Confidential Documents dated February 6, 1981

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

MDL No. 381 (GCP) (All Cases)

In re

"AGENT ORANGE"

Product Liability Litigation

1. This Protective Order establishes procedures for the production by the defendants herein of documents containing confidential developmental, business, research or commercial information.

2. Certain documents or categories of documents which a particular defendant is requested to produce in this litigation may be deemed confidential by such defendant due to the developmental, business, research or commercial information contained therein. Such defendant will stamp all such documents "CONFIDENTIAL" prior to their production and such documents are hereinafter referred to as "Confidential Documents."

3. Within 10 days after a defendant has designated a document or documents as "CONFIDENTIAL," such defendant will prepare and distribute to lead counsel for plaintiffs and to all other defendants and third-party defendants a notice of confidentiality which identifies each such document or documents by date, author, recipient, distributees and general subject matter. At the same time that the notice of confidentiality is distributed, such de-

fendant will prepare and distribute to lead counsel for plaintiffs and to all other defendants and third-party defendants an index of Confidential Documents which identifies all of the Confidential Documents of such defendant as of the date of the index. Thereafter, such defendant may avail itself of one of two procedures.

4. *Procedure A:* Such defendant will make available for discovery and inspection by any party hereto the Confidential Documents listed on the notice of confidentiality or the index in accordance with the terms and conditions hereinafter set forth.

5. Confidential Documents produced pursuant to Procedure A shall be used solely for the purposes of the instant litigation, will be kept confidential, and will not be exhibited or described to and their contents will not be disclosed to or discussed with anyone not designated as hereinafter described, and said documents and the information contained therein shall not be used for any other purposes.

6. Confidential Documents produced pursuant to Procedure A, if filed with the Court, shall be filed under seal.

7. Only the following "designated persons" shall have access to Confidential Documents produced pursuant to Procedure A:

(a) Partners, associates, paralegals, law clerks and clerical personnel, if any, of the counsel representing parties to this action;

(b) The parties to this action, except that with respect to the defendants and third-party defendant United States of America, a reasonable number of employees of each;

(c) Persons retained by counsel for the parties to this action to assist in preparation for trial or to serve as expert witnesses in this litigation; and

(d) A witness to a deposition, including any party or any employee of any party, will constitute a designated person provided that:

(i) All persons in attendance at the deposition are designated persons, except for the court reporter;

(ii) The witness is advised on the record or in writing of the existence and contents of this Order and the witness agrees on the record or in writing to be bound by its terms, or the Court, after motion on notice to all parties, orders such compliance;

(iii) Copies of Confidential Documents, though identified and numbered as exhibits to the deposition, will not be made a physical attachment to the transcript of the deposition;

(iv) Every effort will be made at the deposition to so restrict testimony concerning Confidential Documents that their confidentiality will be preserved on the record to the greatest extent possible; and

(v) Those portions of the deposition transcript which pertain to the contents of Confidential Documents shall be filed with the Court, under seal, with access thereto restricted to persons designated herein.

8. No persons described in Paragraph 7(a), (b) or (c) hereof shall be given access to any Confidential Docu-

ments produced pursuant to Procedure A until each such person has executed an undertaking in the form annexed hereto as Exhibit "A." Clerical help employed by counsel to any party herein need not execute any such undertaking, but need only be advised of the contents of this order and agree to be bound thereby. Every person who executes an undertaking shall provide a copy thereof to counsel for each defendant and shall file a copy thereof with the Clerk of the Court.

9. If any person except the court reporter who is present at a deposition at which the contents of Confidential Documents are discussed has not executed an undertaking as described in paragraph 8 hereof, such person shall state on the record that he agrees to be bound by the terms of this order. If any person objects to the confidential designation of any Confidential Documents utilized at the deposition, such person shall state the basis of his objection on the record. Thereafter, within 10 days of the receipt of the transcript of said deposition, any interested party may serve and file a motion, on notice to all parties, to preserve the confidential designation of any such Confidential Documents and for any other appropriate relief. All parties agree to be bound by the terms of this order with respect to such Confidential Documents pending the disposition of said motion.

10. Each and every person present at any deposition or other proceeding wherein any Confidential Documents produced pursuant to Procedure A are utilized in any manner is hereby enjoined from disclosing to the press or other media any testimony concerning or information involving such documents.

11. Each and every person or party subject to this Order is enjoined from referring in open Court to the con-

tents of Confidential Documents produced pursuant to Procedure A, and any reference or mention of the contents of Confidential Documents shall be heard by the Court in camera.

12. If any answers to interrogatories reflect information contained in any Confidential Documents produced pursuant to Procedure A, those answers shall be set forth in a separate document designated by the party preparing said document as "Answers to Interrogatories Reflecting Information Contained in Confidential Documents." Said separate document shall be distributed only to designated persons as described herein; and shall be filed with the Court under seal.

13. *Procedure B:* Within 10 days after the distribution by a defendant of a notice of confidentiality identifying certain Confidential Documents, that defendant may serve and file a motion, on notice to all parties, for an order that some or all of the Confidential Documents listed on the notice of confidentiality need not be produced, or need be subject to such limited disclosure under such terms and in such a manner as the Court may order. The documents listed on the notice of confidentiality with respect to which such a motion will be made shall be marked by an asterisk. After the service of a notice of confidentiality and prior to the making of said motion, the parties will meet to attempt to work out an agreement regarding the production of said documents.

14. Each defendant may distribute notices of confidentiality and indexes identifying Confidential Documents, and avail itself of either Procedure A or Procedure B, at various times during the discovery stage of this litigation as the need arises by preparing and distributing a notice of confidentiality or an index, and thereafter availing

itself of either Procedure A or Procedure B, a defendant does not waive its right to prepare and distribute further notices of confidentiality and indexes and thereafter adhere to the procedures set forth herein.

15. Upon the termination of all of the actions consolidated as part of MDL No. 381, all persons who have copies of Confidential Documents produced pursuant to Procedure A shall make a good faith effort to return all such copies to the defendant making production thereof or, in the alternative, shall make a good faith effort to destroy all such copies. At that same time all such persons shall also notify counsel for the defendants in writing that a good faith effort has been made to destroy or return all copies of Confidential Documents.

16. This order is concerned only with procedures for the production and use of Confidential Documents during the pretrial stages of this litigation. A separate order will be entered at the appropriate time regarding the use of Confidential Documents during the trial or trials of any matter or issue herein.

17. No modification of this order will be made except upon written application to the Court, on notice to all parties. Prior to any such application, the party seeking to modify this order will meet with all interested parties to attempt to work out an agreement with respect to such modification.

SO ORDERED:

Dated: Westbury, N.Y.
February 6, 1981

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U.S.D.J.

Special Master's Memorandum Opinion and Protective Order dated October 14, 1982

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

MDL No. 381(GCP) (All Cases)

In Re

"AGENT ORANGE"

Product Liability Litigation

In this major action, Vietnam veterans and members of their families seek relief for injuries claimed to have been sustained as a result of exposure to various toxic herbicides, particularly *Agent Orange,* manufactured by defendants and supplied by them to the Government for use in the Vietnam War. On April 29, 1982, Judge George C. Pratt appointed the undersigned as Special Master to supervise all pretrial discovery. Since that date I have held extensive hearings on discovery matters. Detailed deposition schedules have been implemented and numerous documents and disputes concerning their availability have been reviewed. Since February 6, 1981, there has been in effect a protective order, approved by Judge Pratt, which established procedures for production by defendants of documents containing confidential developmental, business, research or commercial information. In order to expedite discovery in view of the Judge's setting the date of June 13. 1983 for the trial of the issue of the government contractor's defense, I initially ruled that all exchanges of documents

between the parties and between the government* and the parties, be under a general protective order and that the contents of the depositions not be disclosed. (*See* Transcript of Hearing of May 19, 1982 at 366-67, 369-70). I also indicated to the parties that this was a preliminary ruling and that further discussion of the issue was to be anticipated. (*Id.* at 370.)

In July 1982, counsel for Columbia Broadcasting System, Inc. (CBS) contacted me, wanting to raise the issue of third-party access to documents not covered by the February 6, 1981 protective order. I invited counsel for CBS to raise the matter informally at a pre-trial hearing in Washington, D.C. on July 14, 1982, which they did. Upon hearing objections by all defendants and the Government, I recommended that CBS file a formal motion for access to non-classified and non-confidential documents with the court. On July 29, 1982 CBS did so, and by order dated August 5, 1982, Judge Pratt referred the matter to me for decision.

On September 2, 1982, after extensive argument from the parties, the government and CBS, I dictated into the record a recommended order, pursuant to Rule 26(c) of Fed. R. Civ. P., which prohibits the parties to this litigation from wholesale disclosure to non-parties of materials produced in discovery (Tr. of 9/2/82 at 1701-09, 1772). I directed that any party desiring to disclose certain documents first raise the issue before me, whereupon the party opposing disclosure would have the burden of showing

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* Although not a formal party to these proceedings, the United States has recognized the importance to this litigation of its documents and of its present and former employees as witnesses, and has assured the court of its cooperation in the discovery necessary for a fair determination of the issues.

good cause why the protective order should continue to apply. (*Id.*) CBS has appealed this ruling. At the September 2nd hearing, I also indicated that it would be desirable to draft a formal protective order incorporating procedures for dissemination of certain documents (*id.* at 1769), and that a written memorandum opinion supplementing my oral determination may be of value. Copies of this opinion and protective order will be forwarded to the parties and CBS in order that they may make reference to it in the appeal now before Judge Pratt.

On the basis of the complexity of this litigation, the emotionalism surrounding the issues, the number of documents yet to be reviewed and the desirability of moving discovery expeditiously in order to meet the June 1983 trial date, I determined that good cause exists for the issuance of a blanket protective order. In light of First Amendment considerations discussed below, the order also provides a procedure by which the parties can seek specific review of the order as it pertains to particular documents. CBS, which is not a party to this litigation, asserts that it has a First Amendment right of access to inspect and copy the documents produced by the parties in discovery and argues that the Special Master's use of Rule 26(c) violates this right.

While the press has a right of access to court records and proceedings, *Zenith Radio corp. v. Matsushita Elec. Industrial Co., Ltd.*, 529 F. Supp. 866, 895 (E.D. Pa. 1981) citing *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 100 S. Ct. 2814 (1980) and *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 597-99, 98 S. Ct. 1306, 1311-13 (1978), such a right is not absolute. *Id.* at 598, 98 S. Ct. at 1312. Discovery material, merely

because it is produced pursuant to the judicial process, is not necessarily part of the public record. *See, e.g., Zenith Radio Corp. v. Matsushita Elec. Industrial Co., Ltd.,* 529 F. Supp. at 897 n. 55. As Judge Hall pointed out in *Times News Ltd. (Gr. Brit.) v. McDonnell Douglas Corp.,* 387 F. Supp. 189 (C.D. Ca. 1974), the very fact that the discovery rules are so broad supports limiting disclosure of materials obtained under those rules. *Id.* at 196. Liberal discovery gives the parties an opportunity to refine the issues, *Hickman v. Taylor,* 329 U.S. 495, 561, 67 S. Ct. 385, 388 (1947), and better prepare for trial. Thus, it is no reason for objection to discovery that the materials will not be admissible at trial. 28 U.S.C. § 26(b)(1) (1976). *See, Hallinckrodt Chemical Works v. Goldman, Sachs & Co.,* 58 F.R.D. 348, 353 (S.D.N.Y. 1973). *See,* 4 Moores Fed. Pract. ¶ 26.55[1] at 26-113. However, the liberal standard governing disclosure to parties was not intended to enable non-parties to inspect documents which have not yet been filed with the court. *See, Zenith Radio Corp. v. Matsushita Elec. Industrial Co., Ltd.,* 529 F. Supp. at 897 (where Judge Becker exempted from disclosure those documents produced in discovery which were not in the custody of the court); *Wilk v. American Medical Association,* 635 F.2d 1295, 1299 n. 7 (7th Cir. 1980) (where Judge Wisdom noted that the "raw fruits of discovery" are not in the possession of the court until introduced into evidence. *Id.*)

The First Amendment therefor does not grant CBS access to documents which are not filed with the court and which are not yet (and may never become) part of the public record. *See, Times News v. McDonnell Douglas, supra.*

A more difficult question is presented by the restraints which a protective order places upon the parties' rights to disseminate discovered material. A protective order, by encouraging the parties to make full disclosure of material they might otherwise withhold, serves the "vital function" of securing just, speedy and inexpensive determination of civil disputes. *Martindell v. ITT,* 594 F.2d 291, 295 (2d Cir. 1979). However, insofar as it forbids or limits dissemination by a party of materials obtained through the discovery process, a protective order also directly implicates the First Amendment right to free expression. *In re Halkin,* 598 F.2d 176, 190 (D.C. Cir. 1979). Thus, where a protective order seeks to limit dissemination, an analysis of what constitutes good cause for purposes of Rule 26(c) must take into account both the constitutional interest in unfettered expression and the public interest in the functioning of the discovery process. *In re Halkin,* 598 F.2d at 191; *In re San Juan Star Co.,* 662 F.2d at 116 ("in general . . . we find the appropriate measure of such limitations [on expression] in a standard of 'good cause' that incorporates a 'heightened sensitivity' to the First Amendment concerns at stake." *Id.* at 116, citations omitted).

In *In re San Juan,* the court, in reviewing a protective order which prohibited the attorneys from disclosing evidence obtained through depositions to any third party, listed the factors to which a court should look in assessing the validity of such a protective order: "the magnitude and imminence of the threatened harm [posed by dissemination], the effectiveness of the protective order in preventing the harm, the availability of less restrictive means of doing so, and the narrowness of the order." *In re San Juan,* 662 F.2d at 116. As to measuring the magnitude and imminence of the threatened harm, the *San*

Juan court stated that these considerations should be applied on a sliding scale; where dissemination would injure a sufficiently important interest, the likelihood of such an injury occurring would need to be less than if the injury were to be to a less important interest. Thus, as the *San Juan* court noted, a threatened harm to a defendant's deep-seated interest in a jury trial need only be reasonably likely; a threatened harm to a less important interest would need to be serious and unmistakable. *Cf. In re Halkin,* 598 F.2d at 191 where the court applied a more stringent standard: "[T]he harm posed by dissemination must be substantial and serious." *Id.*

Both the *Halkin* court and the *San Juan* court recognized the need for flexibility in the discovery process. *In re Halkin,* 598 F.2d at 196; *In re San Juan Star Co.,* 662 F.2d at 114-15. The *Halkin* court indicated that a blanket protective order might be appropriate in discovery involving large-scale exchanges of documents. There, the court noted that providing a procedure for dissemination of documents under such a protective order accommodates the First Amendment. *See, In re Halkin,* 598 F.2d at 196 n. 47.

The attached protective order attempts to recognize the tensions which exist between the public's interest in the functioning of the discovery process and its interest in protection of First Amendment rights. The order seeks to adhere to the guidelines set forth in both the *Halkin* and *San Juan* cases. The potential harm which would occur as a result of disclosure of discovery material cannot be minimized. Trial of this case has been set for June 1983. With less than eight months to the date of trial and with literally hundreds of thousands of documents still to be produced and examined and many depositions yet to be

held, a blanket order enables the parties to concentrate on the business of discovery. Limiting the parties from freely disclosing discovery material is desirable in order for the parties to develop the issue of the government contractor's defense. In terms of case management, the blanket protective order also serves the purpose of expediting discovery by encouraging free disclosure of documents between the parties and between the government and the parties, and avoids numerous satellite hearings on the propriety of the marking of documents as confidential. There also exists a potential threat to a party's right to a fair trial should there be pretrial publicity concerning documents on which no ruling as to relevance or prejudice has been made.

This protective order guards against the harms posed by indiscriminate publicity without unduly restraining the parties' First Amendment rights. Indeed, the order is almost identical to that chosen by the *Halkin* court to illustrate what might be proper in a case involving large-scale exchanges of documents. *See, In re Halkin,* 598 F.2d at 196 n. 47. Counsel are still free to publicize their opinions; the press remains free to publish any information it learns about the case. No attempt is being made to 'gag' the press or to prevent it from seeking information through whatever avenues it should chose, excepting pre-trial discovery. Nor does the order bar the parties' rights to disseminate. The order takes issue only with CBS' claim of access to the fruits of discovery. It allows any party who desires to disclose a particular document or category of documents to make an application to the Special Master. The party which seeks to disseminate does not have the burden of proving good cause; rather the party opposing disclosure must show that good cause sufficient to justify

the continuation of protection of the particular document exists.

Finally, the order is narrow in scope, applying only to disclosure of discovery material produced by a party or the government through depositions or productions of documents during the pretrial phase of the case. Indeed, as discovery progresses and fundamental disputes are resolved, it may become desirable to lift this order. Accordingly, upon application by any party to this lawsuit or the Government, this protective order will be reexamined after 120 days have elapsed.

Dated: October 14, 1982

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Sol Schreiber
Special Master

Opinion of the District Court

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

MDL No. 381

Jan. 18, 1983

In re

"AGENT ORANGE"

Product Liability Litigation

PRETRIAL ORDER NO. 43

GEORGE C. PRATT,* Circuit Judge.

In this multidistrict litigation, plaintiffs, Vietnam war veterans and members of their families, seek to recover for injuries allegedly suffered as a result of the veterans' exposure to various herbicides, which defendants manufactured and supplied to the government for use in the Vietnam war. On April 29, 1982, the court appointed Sol Schreiber as special master pursuant to FRCP 53, to supervise all pretrial discovery for the Phase I trial on the government contract defense, scheduled to commence in June 1983. Pretrial Order No. 35.

On July 29, 1982, CBS, Inc. (CBS) filed a motion seeking access to nonclassified and nonconfidential documents produced by the defendants and/or the United States gov-

* Of the U.S. Court of Appeals for the Second Circuit, sitting by designation.

ernment during discovery. The court referred the motion to the special master for consideration and a recommendation. On October 14, 1982, the special master signed a protective order incorporating procedures for the dissemination of the documents at issue. Simultaneously, he submitted a memorandum to the court in support of the protective order. CBS appeals from that portion of the order which prohibits disclosure of nonconfidential and nonclassified documents produced during discovery. No party to the litigation appeals from the order. Defendant Dow has submitted a memorandum in support of the order.

The protective order, which is reproduced in its entirety in the appendix, provides that only "designated persons" (parties, their attorneys, expert witnesses, witnesses to depositions) shall have unrestricted access to the discovery material at issue. If a designated person wishes to disseminate such material to a person who is not so designated, he "shall make an application to the special master for removal of this protective order as to that 'document' or category of 'documents' ". The party seeking to affirm the protective order is given five days to respond to the application to disseminate, and has the burden of showing, pursuant to FRCP 26(c), that good cause exists for continuation of the order with respect to the documents in question. Those seeking to disseminate are given a further opportunity to respond in opposition.

The order provides that the special master will examine the documents to determine whether good cause exists to continue the protective order. The last two paragraphs of the order provide:

> 12. Counsel are not barred from discussing in general terms what their claims are and what they believe they will be able to prove, nor are they

> limited from making public any material obtained independently of the discovery process.
>
> 13. Nothing in this Order shall prohibit the press from exploring all avenues in a search to discover information pertaining to the claims in this litigation, nor from publishing any information it learns about the case.

In his memorandum accompanying the protective order, the special master indicated that he based his determination that good cause exists for the order on the "complexity of this litigation, the emotionalism surrounding the issues, the number of documents yet to be reviewed and the desirability of moving discovery expeditiously in order to meet the June 1983 trial date". He discussed in detail the first amendment concerns raised by CBS and concluded that his order, while serving the ends of expediting discovery and protecting the parties' right to a fair trial, does not unduly restrain first amendment rights.

CBS, who is not a party to this action, attacks the order on two grounds: (1) that it violates the first amendment right of the public and CBS to access to the materials obtained in discovery; and (2) that it violates the parties' first amendment right to disseminate those materials freely.

Right of Access

CBS argues that the special master's protective order denies CBS access to potential sources of information and thus violates its first amendment rights and those of the public. If there is a right of access to discovery materials, CBS has standing to assert that right because an order limiting it would impair "its ability to gather the news concerning the trial". *CBS, Inc. v. Young,* 522 F.2d 234, 238 (CA6 1975); *see In re Application of National Broadcasting Co.,* 635 F.2d 945 (CA2 1980).

However, the Court concludes that there is no independent right of access by non-parties to materials produced in discovery and not made part of the public record. CBS does not seek access to filed documents, court exhibits, or trial proceedings, all of which are public records and to which the press generally has unrestricted access, *Globe Newspaper Co. v. Superior Court, Norfolk County*, — U.S. —, —, 102 S.Ct. 2613, 2618, 73 L.Ed.2d 248 (1982) (first amendment right of access to criminal trials); *In re Application of National Broadcasting Co., Inc., supra*, 635 F.2d at 949-51 (common-law right of access to inspect and copy judicial records, court exhibits and trial proceedings). What is at issue here is access by a non-party to documents obtained by a party pursuant to discovery requests but not filed with the court.

The broad discovery encouraged by the Federal Rules of Civil Procedure of necessity results in production of many documents and other materials which will not be used at trial. As with the documents and information at issue here, discovery material does not necessarily become part of the public record. *See, e.g., Zenith Radio Corp. v. Matsushita Elec. Indus. Co., Ltd.*, 529 F.Supp. 866, 897 (E.D.Pa. 1981). The same factors that support a right of access to judicial records and other public documents—the public's right to know and the public interest in insuring that judicial proceedings are conducted fairly, to name but two—simply are not implicated where the materials were obtained by a party through discovery but have not yet been filed with the court. *See Times News, Ltd. (Gr. Brit.) v. McDonnell Douglas Corp.*, 387 F.Supp. 189, 194-96 (C.D. Cal.1974). In short, CBS has no right of access to the documents it seeks here, and its motion for access on this ground must be denied.

The court notes that the protective order does not in any way prevent CBS from reporting on the Agent Orange litigation, or from obtaining the same material from other, independent sources. In addition, while it is not necessary to address the government's argument that CBS should exhaust the possibility of obtaining the requested material under the Freedom of Information Act, 5 U.S.C. §§ 552 *et seq.*, it should be noted that CBS may well be able to obtain much of the sought-after material through that channel. Thus, the fact that CBS has no independent right of access to documents produced in discovery does not mean that it has no alternative means of obtaining and reporting on this information.

Right to Disseminate.

CBS also argues that it has a first amendment right of access to documents produced in discovery which "follows inextricably from the right of counsel and the litigants themselves to freely disseminate documents and information received in discovery * * ", CBS Memo on Appeal at 8, and that it is asserting the parties' rights of dissemination, which CBS claims are infringed by the special master's order.

While several cases have addressed the first amendment interests at stake when protective orders place limits on dissemination of materials obtained during the discovery process, *In re San Juan Star Co.*, 662 F.2d 108 (CA1 1981); *In re Halkin*, 598 F.2d 176 (D.C.Cir.1979); *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 529 F.Supp. 866 (E.D.Pa.1981), they have not addressed the issue of a non-party's standing to assert a party's right to disseminate where the party itself does not assert the right. Neither plaintiffs nor defendants have appealed from the special master's protective order, and the court concludes that CBS

does not have standing to assert the parties' rights where they have not chosen to assert them at this time.

Attached to CBS's memorandum appealing from the special master's order is a letter from lead counsel for plaintiffs to the special master requesting that all nonclassified and nonconfidential documents be released from the protective order. By letter to the court dated October 7, 1982, CBS indicates that it attached the letter to show that plaintiffs wish to disseminate the documents at issue and that therefore CBS may assert its right to access to those documents plaintiffs wish to disseminate.

While it may be correct that plaintiffs wish to disseminate some or all of the documents which have been produced in discovery, that issue is not before the court at this time. Counsel for plaintiffs submitted the letter to the special master at a meeting on September 16, 1982, and at that time the special master, after hearing the views of counsel for plaintiffs, defendant Dow, and the government, indicated that he would hold the request in abeyance pending the court's ruling on CBS's appeal of his protective order. R. at 1836, 1841. Consequently, plaintiff's request to disseminate is not before the court at this time.

The court does note that the special master's protective order is particularly appropriate and suited to the circumstances of this litigation. While CBS argues that "mere" case management is not sufficient justification for a protective order, the court must emphasize that this case may never be able to reach trial if there is not full cooperation on the part of all parties concerned—plaintiffs, defendants, and the government. The subject matter of this lawsuit of necessity involves discovery of sensitive and confidential documents, both government and corporate. Under the liberal discovery encouraged by the federal rules, the parties

have explored broadly the records of government agencies and deposed numerous agencies and witnesses who might be less cooperative if the material and testimony they produced, no matter how irrelevant, became subject immediately to the intensive media scrutiny this litigation inevitably attracts. The interest of preserving the efficient and effective functioning of the discovery process weighs substantially in favor of a protective order, *In re Halkin, supra*, 598 F.2d at 192, and there is no question that this interest would be significantly impaired were there no protective order in this case.

The special master's protective order shifts the very slight burden of going forward to the proponents of dissemination. Those wishing to disseminate merely need to indicate which documents they wish to disseminate, and the burden is then upon those opposing dissemination to show "good cause" pursuant to FRCP 26(c) why the protective order should be continued. It is hoped that this procedure will result in the court's having to review only those particular documents a party wishes to disseminate, rather than having to review every document that some party wants covered by a protective order. Of course, this procedure could be frustrated by a blanket request for dissemination, but a party making that request will have to face as a consequence the inevitable delay which would result from the court's having to review literally thousands of documents. It is presumed that the parties will act in good faith and will tailor their requests for dissemination appropriately.

In conclusion, CBS's application for access to nonclassified and nonconfidential documents produced during discovery is denied. The court approves and adopts the special master's protective order of October 14, 1982.

SO ORDERED.

APPENDIX

SPECIAL MASTER'S PROTECTIVE ORDER

1. This protective order seeks to limit disclosure of documents and the contents of depositions which are produced pursuant to Rule 26 (hereinafter "discovery material") during the pretrial stages of this case.

2. In light of the complexity of this case, the number of documents yet to be discovered and depositions yet to be taken, the emotionalism surrounding the issues, the imminence of the June 1983 trial date which requires that discovery be conducted expeditiously, and the fact that many of the documents and depositions may contain highly sensitive material, this Order sets forth a procedure for limited pretrial disclosure of such "discovery material" to persons not designated as hereinafter described.

3. All documents and depositions produced to date and to be produced hereafter pursuant to discovery requests in the course of the pretrial stage of these proceedings, which are not otherwise protected from disclosure pursuant to a protective order previously entered herein, are and shall be designated as protected within the meaning of Rule 26(c) of the Fed.R.Civ.P., and said documents and depositions and the contents or substance thereof, shall not be disseminated, made available for inspection or copying, paraphrased or otherwise disclosed, to any person other than a "designated person" (defined in paragraph 5 hereof) except as permitted herein.

4. All "discovery material," if filed with the Court, shall be filed under seal.

5. Only the following "designated persons" shall have unrestricted access to "discovery material":

(a) Partners, associates, paralegals, law clerks and clerical personnel, if any, of the counsel representing parties to this action;

(b) The parties to this action, except that with respect to the defendants and third-party defendant United States of America, a reasonable number of employees of each;

(c) Persons retained by counsel for the parties to this action to assist in preparation for trial or to serve as expert witnesses in this litigation; and

(d) A witness to a deposition, including any party or any employee of the party, will constitute a designated person provided that:

> (i) All persons in attendance at the deposition are designated persons, except for the court reporter; and
>
> (ii) The witness is advised on the record or in writing of the existence and contents of this Order and the witness agrees on the record or in writing to be bound by its terms, or the Court, after motion on notice to all parties, orders such compliance.

6. No person described in paragraph 5(a), (b) or (c) hereof shall be given access to any "discovery material" until each such person has executed an undertaking in the form annexed hereto as Exhibit "A". Clerical help employed by counsel to any party herein need not execute any such undertaking, but need only be advised of the contents of this Order and agree to be bound thereby. Every person who executes an undertaking shall provide a copy thereof to counsel for each defendant and shall file a copy thereof with the Clerk of the Court.

7. If any person except the court reporter who is present at a deposition at which the contents of "discovery material" are discussed has not executed an undertaking as described in paragraph 6 hereof, such person shall state on the record that he agrees to be bound by the terms of this Order.

8. A "designated person" who desires to disseminate, to a person not designated as herein described, a particular "document" or category of "documents" which has been produced to that "designated person" pursuant to Rule 26 shall make an application to the Special Master for removal of this protective order as to that "document" or category of "documents."

9. Within 5 days, those who seek to affirm the protective order's applicability to the "documents" or categories of "documents" sought to be disseminated to person[s] not designated as herein described, will have the burden of proof to respond to such application, setting forth in such response the reasons why good cause exists for continuation of this protective order. Thereafter, those seeking to disseminate the said "document" or category of "documents" will have an opportunity to respond in opposition to the order.

10. The Special Master shall then examine the "document" or category of "documents" *in camera* to determine whether claim of good cause is supported by the contents of the documents.

11. This Order in no respect supercedes, in whole or in part, the protective order regarding production of confidential documents by defendants dated February 6, 1981.

12. Counsel are not barred from discussing in general terms what their claims are and what they believe they will

be able to prove, nor are they limited from making public any material obtained independently of the discovery process.

13. Nothing in this Order shall prohibit the press from exploring all avenues in a search to discover information pertaining to the claims in this litigation, nor from publishing any information it learns about the case.

Dated: New York, New York
October 14, 1982

So Ordered

/s/ Sol Schreiber
Sol Schreiber
Special Master

EXHIBIT "A"

Agreement Concerning Documents Subject to Protective Order Entered in the United States District Court for the Eastern District on October 14, 1982

The undersigned hereby acknowledges that he has read the Protective Order, dated October 14, 1982, and entered in the United States District Court for the Eastern District of New York on , 1982, in the action entitled *In Re Agent Orange Product Liability Litigation,* MDL No. 381 (All Cases) (GCP), understands the terms hereof and agrees to be bound by such terms as if he were signatory thereto.

Memorandum and Order of the District Court

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

MDL No. 381

Feb. 13, 1985

In re

"AGENT ORANGE"

Product Liability Litigation

Stephen J. Schlegel, Schlegel & Trafelet, Ltd., Chicago, Ill.; Benton Musslewhite, Law Offices of Benton Musslewhite, Inc., Houston, Tex.; Thomas W. Henderson, Henderson & Goldberg, Pittsburgh, Pa.; Phillip E. Brown, Hoberg, Finger, Brown, Cox & Molligan, San Francisco, Cal.; Stanley Chesley, Waite, Schneider, Bayless & Chesley, Cincinnati, Ohio; John M. O'Quinn, O'Quinn & Hagans, Houston, Tex.; Neil R. Peterson, Washington, D.C. and Gene Locks, Greitzer & Locks, Philadelphia, Pa.; Newton B. Schwartz, Houston, Tex.; Irving Like, Reilly, Like & Schneider, Babylon, N.Y.; David J. Dean, Dean, Falanga & Rose, Carle Place, N.Y.; Aaron Twerski, Hempstead, N.Y., of counsel; Victor J. Yannacone, Jr., Yannacone & Yannacone, P.C., Patchogue N.Y., for plaintiffs.

Leonard Rivkin, Rivkin, Leff, Sherman & Radler, Garden City, N.Y.; Philip Pakula, Townley & Updike, Wendell B. Alcorn, Jr., Cadwalader, Wickersham & Taft, William Krohley, Kelley, Drye & Warren, Thomas Beck, Arthur, Dry & Kalish, Richard Goldstein, Shea & Gould, New York City, of counsel; David R. Gross, Budd, Larner, Kent, Gross, Picillo & Rosenbaum, Newark, N.J.; Paul V. Espo-

sito, Lewis, Overbeck & Furman, Chicago, Ill.; Henry G. Miller, Clark, Gagliardi & Miller, White Plains, N.Y., for defendants.

Arvin Maskin, Dept. of Justice, Washington, D.C., for third-party defendant United States.

Cornish F. Hitchcock, Public Citizen Litigation Group, Washington, D.C., for amicus curiae Vietnam Veterans of America.

MEMORANDUM and ORDER

WEINSTEIN, Chief Judge:

In an opinion dated December 17, 1984, Magistrate Shira A. Scheindlin ordered the lifting of the protective orders of February 6, 1981 and October 14, 1982 relating to discovery materials produced by the defendant chemical companies. Defendants appealed.

The Magistrate's thoughtful analysis, briefs submitted on the appeal, and full oral argument have been considered. The Magistrate's order is affirmed for the reasons stated in her opinion and by the court on the record. The Magistrate's opinion is consistent with previous opinions of the court. *See In re "Agent Orange" Product Liability Litigation,* M.D.L. No. 381, slip op. at 7-8 (E.D.N.Y. Jan. 7, 1985) (first amendment and other public interest considerations); 597 F.Supp. 740, 769-70 (E.D.N.Y. 1984) (discussing veterans' concern with making discovery materials public). The Magistrate's opinion therefore is adopted as the Memorandum and Order of the court.

This order is stayed pending final disposition of appeals from this court's final approval of the *"Agent Orange"* class action settlement. *See* slip op. at 136-37 (E.D.N.Y. Jan. 7, 1985); 597 F. Supp. 740 (E.D.N.Y. 1984). The Magistrate's opinion will be published as a Memorandum and Order of this court.

So ordered.

Memorandum and Order of the District Court

Magistrate's Pretrial Order No. 33

December 17, 1984

SHIRA A. SCHEINDLIN, United States Magistrate.

On May 7, 1984 a settlement was reached in the "Agent Orange" litigation. After Rule 23(e) fairness hearings were held throughout the United States, the Court tentatively approved the settlement in an opinion issued on September 25, 1984. During the fairness hearings, the Vietnam Veterans of America ("VVA") made a request on behalf of thousands of veterans who are members of the VVA and of the plaintiff class for public access to much of the discovery material produced by the defendants and the Government over the past five years. That material is now sealed pursuant to various protective orders.

The VVA, as intervenor on the motion, has now moved to lift the protective orders at least with regard to exhibits listed by the parties in their pretrial orders. Victor J. Yannacone, as intervenor on the motion, has also filed a motion to lift the protective orders on behalf of several thousand veterans whom he represents. By his motion Mr. Yannacone seeks to lift the protective orders as to *all* the documents produced during discovery as well as *all* depositions. Finally, the Agent Orange Plaintiffs' Management Committee ("Plaintiffs' Management Committee"), has filed a brief in support of the VVA motion. Thus, both parties and non-parties are now seeking to lift the various protective orders issued during the Agent Orange litigation with regard to all or part of the discovery material.[1]

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[1] There is some question concerning the status of non-representative plaintiff class members. They have been variously described as

(footnote continued on following page)

Memorandum and Order of the District Court

I. The Protective Orders

A. *February 6, 1981:* Commercial Information

On February 6, 1981 Judge George C. Pratt, then supervising the "Agent Orange" litigation, issued an order allowing defendants to designate as "confidential" those records which they contended contained "confidential developmental, business, research or commercial information." *See* PTO 27 para. 1. This order required a party who received documents designated as confidential to refrain from disclosing any such document, to file it with the Court under seal if filing was required, and to return it or destroy it at the end of the litigation.

B. *October 14, 1982:* Blanket Protective Order

In May, 1982 Special Master Sol Schreiber, then supervising discovery in this litigation, orally issued a blanket protective order. This order required that all documents produced by any party and all depositions were to be treated confidentially. In his subsequent memorandum opinion, the Special Master stated that good cause for his order existed because of the

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(footnote continued from preceding page)

"passive parties", *American Pipe & Construction Co.* v. *Utah,* 414 U.S. 538, 94 S.Ct. 756, 38 L.Ed.2d 713 (1974), non-nominal parties. *Katz* v. *Carte Blanche Corp.,* 53 F.R.D. 539, 541 (W.D.Pa. 1971), *rev'd on other grounds,* 496 F.2d 747 (3d Cir. 1974) and "back burner parties" *see generally* Newberg, Newberg on Class Actions § 2830 at 1259 (1977). The prevailing view appears to be that class members are not parties, at least for such purposes as discovery and liability for sanctions. *See id.* at §§ 2820 and 2830. They are considered parties, however, for purposes of being bound by the judgment in a class action, receiving the benefit of the statutes of limitations toll, and having standing to appeal from decisions and object to settlements. *Id.* at § 2830.

> complexity of this litigation, the emotionalism surrounding the issues, the number of documents yet to be reviewed and the desirability of moving discovery expeditiously in order to meet the June 1983 trial date.

See 96 F.R.D. 582, 583 (E.D.N.Y. 1983). This order was approved by Judge Pratt. *Id.* at 585. The Special Master later lifted the blanket protective order as to certain documents, and in his opinion he reiterated his reasons for imposing the blanket order.

> The necessity for encouraging cooperation among the parties and the government and the desirability of implementing an efficient and expeditious discovery program constituted, in my judgment, sufficient cause for the issuance of the blanket protective order in October, 1982.

98 F.R.D. 539, 542 (E.D.N.Y. 1983). The ruling also stated that the blanket order was not to supersede the order regarding production of confidential documents.

C. Protective Orders Regarding Government Records—1980-1983

Over the years of this litigation, the Court issued various protective orders that relate to Government documents. The earliest order, PTO 19 (May 21, 1980), protects from disclosure confidential medical records on file with the Veterans Administration. In issuing this order, the Court found that the public interest in and need for disclosure were outweighed by (1) the potential for injury to the persons who are the subjects of these medical records (2) the treatment services need to maintain the confidentiality of such records, and (3) the requirements of the physician-patient relation-

ship. *Id.* at 1. PTO 42, 96 F.R.D. 578 (E.D.N.Y. 1983), issued on January 13, 1983, protects from public disclosure records of the Environmental Protection Agency ("EPA") that are designated by the Government as trade secrets and/or confidential business information. The Court ordered blanket protection for these agency documents because an agency review of each document, for claims of privilege or confidentiality in advance of production, would have created inordinate delay and expense. *Id.* at 579. PTO 47, 97 F.R.D. 424 (E.D.N.Y. 1983), protected certain records of an official of the U.S. Department of Agriculture. PTO 48, 97 F.R.D. 427 (E.D.N.Y. 1983), established guidelines for the assertion of the deliberative process privilege and the state secrets privilege over Government documents.[2]

II. Status of the Documents and Depositions Covered by the Protective Orders

A. Private Defendants

On May 12, 1983 Judge Pratt ruled on summary judgment motions that resulted in the dismissal of four defendants. At that time he recommended that the Special Master consider lifting some portion of the blanket protective order. On June 21, 1983 the Special Master recommended that the court lift the protective order as to all documents that were "submitted with and referred to in the parties' sum-

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[2] Pursuant to this order the Special Master reviewed hundreds of Government documents, many of which were found to be irrelevant. Almost all of the relevant documents were produced by the Government pursuant to the blanket protective order. A handful of documents were found to be protected from disclosure by the state secrets privilege. Because an appeal as to the finding of privilege is now time barred, the status of those documents is no longer subject to review.

mary judgment papers." 98 F.R.D. 539, 548 (E.D.N.Y. 1983).

The Special Master concluded that the court should release these materials from the protective order because the common law public right of access had attached to those documents that were part of the judicial record. *See Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 98 S.Ct. 1306, 55 L.Ed.2d 570 (1978). He further found that documents submitted to and relied on by the Court in reaching a determination as to summary judgment are part of the judicial record. *Zenith Radio Corp. v. Matsushita Electric Industrial Co. Ltd.*, 529 F.Supp. 866 (E.D.Pa. 1981); *Cianci v. New Times Publishing Co.*, 88 F.R.D. 562, 565 (S.D.N.Y. 1980). After concluding that a presumption of public access exists with regard to these documents, the Special Master then weighed the interests of the defendants in maintaining confidentiality against the presumption in favor of release.

In deciding to release the documents to the public, the Special Master made the following argument.

> The public has an interest in learning more about the nature of the issues raised by this complex litigation involving thousands of veterans and members of their families; the plaintiffs' claim of exposure to dioxin; and the chemical companies defense that the product was harmless, produced in accordance with government specifications during warfare. Indeed, apart from the Agent Orange litigation, dioxin has sparked much public interest and debate, as contamination has been discovered in the soil of towns and cities around the country. . . . It is this gain in public understanding which heightens the public interest in the summary judgment documents . . . .

98 F.R.D. at 547. The only argument cited by the Special Master in support of defendants' opposition to the lifting of the order was defendants' fear of prejudicial pretrial publicity resulting from the release of these documents. *Id.* at 546-548. In balancing these competing interests, the Special Master ordered disclosure and was affirmed by the district court. *Id.*

Except for the June, 1983 order that allowed disclosure of the summary judgment documents, the protective orders remain in full force and effect as to the private defendants. The remainder of the discovery items protected by those orders may be divided into two groups. One group consists of those documents and deposition testimony that were listed by one party or another in their pretrial orders as evidence that they intended to offer at trial. The pretrial orders were filed with the Court on or about April 23, 1984. Each pretrial order submitted by defendants included the following language:

> Accordingly, . . . [defendant] hereby incorporates by reference into its PTO all such joint exhibits and witnesses identified by other defendants.
>
> . . . .
>
> The foregoing exhibit and witness lists *and the exhibits submitted therewith* constitute [defendant's] Preliminary Pretrial Order.

Defendants' Pretrial Orders, April 23, 1984 (emphasis added).

There is no question that the exhibits listed in the pretrial orders were filed with the Court, albeit under seal. The documents were not individually docketed by the Clerk's

Office nor did they remain physically in possession of the Clerk.[3]

The second category of documents represents the raw fruits of discovery. These documents have never been filed with the Court. Nonetheless, the documents are being maintained by the parties pursuant to court order. On September 25, 1984, following a number of fairness hearings throughout the nation, Chief Judge Weinstein issued a Preliminary Memorandum and Order on Settlement. In that ruling, the Court ordered the parties to file all of the raw fruits of discovery with the Court.

> The parties are expected to file all depositions and other papers obtained in discovery in a depository at the courthouse in accordance with directions to be provided by a Magistrate who will determine sealing and disposition subject to appeal to the court.

In re "Agent Orange" Product Liability Litigation, 597 F. Supp. 740, 770 (E.D.N.Y. 1984). Rule 5(d) of the Federal Rules of Civil Procedure directs that all papers required to be served on the opposing party be filed with the court unless the court orders otherwise. In that event, the documents must still be filed "on order of the court or for use in the proceeding." Fed.R.Civ.P. 5(d). Despite the preliminary approval of the settlement, there is no doubt that jurisdiction remains in the district court now to require the filing of all of the materials obtained in discovery as con-

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[3] The documents accompanying the pretrial orders were delivered to the courthouse and were stored in a locked room on the sixth floor of the building. Keys were available to courthouse personnel and the parties. After the tentative settlement was reached on May 7, the parties removed the documents from the courthouse.

templated by the Federal Rules.[4] Thus, pursuant to the Court's order all discovery materials are ordered filed with the Clerk of the Court, at such time as this Order shall be deemed final.

B. Government Documents

On October 14, 1982, as noted earlier, a blanket protective order was issued which provided that all documents produced by any party as well as all depositions were to be treated confidentially. In June, 1983 the seal of confidentiality was lifted from all summary judgments documents. With the consent of the Government, the blanket protective order was also lifted in October, 1983 as to most Government documents and depositions. 99 F.R.D. 645 (E.D.N.Y. 1983).

VVA and Mr. Yannacone are now moving to lift the three remaining protective orders affecting Government documents. These orders include PTO 19 (May 21, 1980) which protects confidential medical records of the Veterans Administration; PTO 42, 96 F.R.D. 578 (E.D.N.Y. 1983), which protects alleged trade secrets and confidential busi-

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[4] This procedure was explicitly approved by Judge Walter R. Mansfield, Chairman of the Advisory Committee on Civil Rules. In a letter published in the New York Times on August 2, 1980, Judge Mansfield wrote

> . . . a judge would not be expected to excuse parties from filing materials in any case in which the public or the press has an interest, such as a Watergate or similar scandal. Moreover, should the public importance of the material not appear until after filing has been excused, it is expected that the judge, upon motion of the press or other interested persons, would order the parties to file the documents for inspection.

N.Y. Times, Aug. 2, 1980.

ness information in the possession of the Environmental Protection Agency; and PTO 47, which applies to certain documents produced by the U.S. Department of Agriculture.

As a result of these motions, the United States consents to lifting the protective order embodied in PTO 47. A dispute remains as to materials covered by PTO 19 and PTO 42. In ordering the protection in PTO 19, the Court "weighed the public interest and the need for disclosure against the injury to the persons who are the subjects of the information contained in these documents, to the physician-patient relationship, and to the treatment services, ..." and determined that the latter considerations outweighed the public interest and need for disclosure. PTO 19 at 1. PTO 42, which covers the EPA material, describes documents submitted to the EPA by both parties and non-parties as required by various statutes and regulations. The Special Master authorized a blanket protection for these materials, at the request of the Government, because of the large volume of material (estimated to be in excess of one million pages), and the delays and costs that would have been incurred in a document-by-document confidentiality analysis. *See* 96 F.R.D. 578 (E.D.N.Y. 1983).

At oral argument on the instant motion, the Government took the position that the movants could seek this information from the respective agencies under the Freedom of Information Act. The Government assured the movants that if the agency were prepared to release the records, the protective orders would not prevent disclosure. Transcript ("Tr.") at 104-106. Thus, the agency, not the Court, would be the arbiter of confidentiality with respect to these records. The intervenors were amenable to this suggestion. Tr. at 106.

III. Principles of Law

As noted above, class members represented by veterans groups and individual attorneys, as well as the Plaintiffs' Management Committee, are moving to lift these protective orders. For the purpose of this motion I conclude that parties, that is, both representative plaintiffs and class members, are seeking open access to the bulk of the discovery materials.[5] In support of their motion, the veterans have relied on a claimed First Amendment right of access to these materials or alternatively on a common law right of access. A review of the cases convinces me that neither of these principles provides sufficient support for their request.

A. The First Amendment Right of Access to Discovery Materials.

After *Seattle Times Co. v. Rhinehart*, — U.S. ——, 104 S.Ct. 2199, 81 L.Ed.2d 17 *on remand* 98 Wash.2d 226, 654 P.2d 673, *cert. denied*, — U.S. —, 104 S.Ct. 2690, 81 L.Ed.2d 884 (1984), there can be no question that the First Amendment does not *require* open access to discovery materials. In *Seattle Times* the Court approved the imposition of a protective order, pursuant to Wash.S.Ct. C.R. 26(c), that prohibited the parties from disseminating information gathered in pretrial discovery.[6] The informa-

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[5] Intervenors represent the VVA and other class members. See p. 562, n. 1, *supra*. Members of the class seek disclosure not only for themselves, but also for the public at large, the media, the distribution planners and the Congress. Although disclosure is sought by parties, in the broad sense, they are seeking disclosure to non-parties as well parties.

[6] The language of this state statute is identical to that of Fed. F.Civ.P. 26(c). Discovery documents are therefore to be filed publicly unless good cause is shown for the issuance of a protective order.

tion in question concerned the size and nature of a religious foundation's membership, the names of its donors, and the amounts of their donations. After balancing petitioner's interest in free expression with respondent's interest in privacy and religious freedom, the Court approved the lower court's exercise of discretion in favor of imposing a protective order. In reaching this result the Court declared "[a] litigant has no First Amendment right of access to information made available only for purposes of trying his suit." *Id.* 104 S.Ct. at 2207. *See also Gannett Co. v. DePasquale,* 443 U.S. 368, 99 S.Ct. 289, 61 L.Ed.2d 608 (1979) (the press and public can be constitutionally excluded from a pretrial suppression hearing); *Nixon v. Warner Communications, Inc.,* 435 U.S. 589, 98 S.Ct. 1306, 55 L.Ed2d 570 (1978) (no constitutional right of access to copy and disseminate judicial records or evidence used at trial); *International Paper Products Corp. v. Koons,* 325 F.2d 403, 407-408 (2d Cir.1963) (First Amendment does not affect trial court's right to restrain dissemination of pretrial discovery material). Thus, upon a showing of "good cause" the public access to discovery materials may be limited.

B. Common Law Right of Access

Several courts have found a common law right of access to judicial records and documents based on the public's right to supervise, inspect, question or check the workings of the court. In *Seattle Times,* 104 S.Ct. at 2207-08, the Court noted that pretrial proceedings were not public proceedings at common law. The Court also stated that "pretrial depositions are not public components of a civil trial." *Id.* at 2207 (footnote omitted). Finally, the Court concluded that "restraints placed on discovered, but not yet

admitted, information are not a restriction on a traditionally public source of information." *Id.* at 2208. Nonetheless, the notion that there exists a common law right of access to judicial records is well established. In *Nixon v. Warner Communications,* 435 U.S. at 597, 98 S.Ct. at 1311, the Court approved a general right to inspect and copy judicial records. One basis for this right was a "citizen's desire to keep a watchful eye on the workings of public agencies." *Id.* at 598, 98 S.Ct. at 1312. The Court went on to hold, however, that this right of access is not absolute. Courts may limit public access to judicial records where, for example, they include a competitor's business information or would create unnecessary embarrassment or humiliation. *Id.* In *United States v. Criden,* 648 F.2d 814 (3d Cir. 1981), *on appeal after remand,* 681 F.2d 919 (3d Cir. 1982), the court stated that this right of access allowed "public supervision and inspection of *courtroom* proceedings, and the public's interest in learning of important matters." 648 F.2d 814, 822 (emphasis added). *See also Joy* v. *North,* 692 F.2d 880, 893 (2d Cir.1982), *cert. denied,* 460 U.S. 1051, 103 S.Ct. 1498, 75 L.Ed.2d 930 (1983) ("An adjudication . . . should . . . be subject to public scrutiny.") (emphasis added).

This common law right of access to judicial records appears to be limited to those documents actually relied upon by a court in reaching a determination. In *Wilk v. American Medical Ass'n,* 635 F.2d 1295 (7th Cir. 1980), Judge Wisdom noted that "[i]f the purpose of the common law right of access is to check judicial abuses, . . . then that right should only extend to materials upon which a judicial decision is based." *Id.* at 1299 n. 7. (citations omitted). *See also Tavoulareas v. Washington Post Co.,* 724 F.2d

1010, 1016 (D.C.Cir 1984) *reh'g en banc, opinion vacated,* 737 F.2d 1170 (D.C.Cir.1984) ("Though the lines delimiting the common law right of access are vague, we do not believe they include documents not used at trial."); *Nixon v. Warner Communications,* 435 U.S. at 597-98, 98 S.Ct. at 1311-12 ("[i]t is clear that the courts of this country recognize a general right to inspect . . . public . . . judicial records and documents." (footnotes omitted)).[7]

C. A Statutory Right of Access

Fed.R.Civ.P. 26(c) presumes that discovery materials are open to the public. The Rule's requirement that the proponent of non-disclosure prove that good cause exists to limit public access to discovery material demonstrates that, in the absence of such proof, the discovery is open to the public. In *Seattle Times,* 104 S.Ct. at 2209, the Supreme Court tacitly affirmed the validity of the statutory presumption. The Court approved the trial court's finding, in the exercise of its discretion, that the respondent had shown good cause to require a protective order shielding certain information from public view. *Id.* Implicit in that analysis is the conclusion that if respondent had failed to demonstrate good cause, the information would have been available to the public.

Rule 5(d) of the Federal Rules requires that all discovery material be filed with the court unless the court orders otherwise. This filing is required because "such materials

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[7] Relying on a number of these decisions as well as *Zenith Radio Corp.* v. *Matsushita Elec. Co., Inc.,* 529 F.Supp. 866 (E.D. Pa. 1981), this Court has previously stated that "documents produced through the discovery process and not yet submitted to the court are not necessarily part of the public record. . . ." *In re Agent Orange,* 98 F.R.D. 539, 544 (E.D.N.Y. 1983).

are sometimes of interest to those who may have no access to them except by a requirement of filing, such as members of a class, litigants similarly situated, or the public generally." Fed.R.Civ.P. 5(d) Advisory Committee Note. Of course, federal district courts may adopt local rules that direct the parties *not* to file discovery materials except on order of the court. Rule 18(a) of the Joint Local Rules of the Southern and Eastern Districts of New York provides that

> [p]ursuant to Rule 5(d) of the Federal Rules of Civil Procedure, depositions, interrogatories, requests for admissions, and answers and responses shall not be filed with the Clerk's Office *except by order of the court.*

S.D.N.Y., E.D.N.Y.Civ.R. (18a) (1983) (emphasis added).

In 1978, this district's present local rule was proposed by the Advisory Committee on Civil Rules with the accompanying note.

> [A]ny party may request that designated materials be filed, and the court may require filing on its own motion. It is intended that the court may order filing on its own motion at the request of a person who is not a party who desires access to public records, subject to the provisions of Rule 26(c).

Proposed Rule 5(d) Advisory Committee Note, Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure, 77 F.R.D. 613, 622-23 (1978). Thus, both Rule 26(c) and Rule 5(d) require that discovery is presumptively open to public scrutiny unless a valid protective order directs otherwise.

IV. A Reexamination of the Protective Orders

A. Burden of Proof and the Nature of the Burden

There is no question that a Rule 26(c) order is subject to modification. *Martindell v. International Telephone & Telegraph Corp.*, 594 F.2d 291, 296 n. 7 (2d Cir.1979) *American Security Co. v. Shatterproof Glass Corp.*, 20 F.R.D. 196, 197 (D.Del.1957) ("The entry of a secrecy order . . . is a matter within the Court's sound discretion and, once entered, subject to modification when deemed advisable by the Court."). Indeed, when issuing the original blanket protective order in October, 1982, the Special Master stated, "as discovery progresses and fundamental disputes are resolved, it may become desirable to lift this [protective] order." Special Master's Memorandum Opinion and Protective Order (October 14, 1982).

Any request to lift or modify a protective order should be "left to the sound discretion of the trial court." *Krause v. Rhodes,* 671 F.2d 212, 219 (6th Cir.) *cert. denied sub nom. Attorney General of Ohio v. Krause,* 459 U.S. 823, 103 S.Ct. 54, 74 L.Ed.2d 59 (1982) (quoting *Nixon v. Warner Communications,* 435 U.S. at 599, 98 S.Ct. at 1312). *See also In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litigation,* 101 F.R.D. 34 (C.D.Cal.1984). Thus, the decision to lift the protective orders in this litigation is discretionary. Nevertheless, every discretionary act must be governed by the applicable legal requirements.

A number of cases conclude that on a motion to lift a protective order the burden remains on the party seeking continued protection to show good cause for that continuation. The most recent case to address this issue is *Petroleum Products,* 101 F.R.D. at 34. There the district court

held that the burden of showing good cause for a continued need for protection remained on the protected party. In reaching this determination the court specifically disagreed with the burden shifting approach approved by the court in *Zenith Radio Corp. v. Matsushita Electric Industrial Co., Ltd.*, 529 F.Supp. 866, 894 (E.D.Pa.1981). Unlike the plaintiffs in *Zenith*, the *Petroleum Products* intervenors were not parties to the action and thus could not have ratified the blanket protective orders or waived the right to "seek declassification *en masse* by failing to bring contemporaneous motions to declassify. . . ." *Petroleum Products*, 101 F.R.D. at 43. The court also rejected the protected parties' argument that they had relied on the protective order in agreeing to produce the discovery, by noting that the discovery would have been ordered by the court in any event if relevant. The court found that reversing the burden would "impose a significant and perhaps overpowering impairment on the public access right." *Id.* at 44. Finally, the court found no evidence in the record that the protected parties had ever shown that a "substantial and specific harm to their competitive positions would result" if the discovery in question were disclosed. *Id.* The court therefore left the burden of continuing to establish good cause on the party seeking continued protection. *See also Essex Wire Corp. v. Eastern Electric Sales Co.*, 48 F.R.D. 308 (E.D. Pa.1969).

However, another line of authority exists. In *Federal Deposit Insurance Corp. v. Ernst & Ernst*, 677 F.2d 230 (2d Cir. 1982), the court held that a confidentiality order can only be modified "if an extraordinary circumstance or 'compelling need' warrants the requested modification." *Id.* at 232 (citing *Martindell*, 594 F.2d at 296). *See also, Iowa Beef Processors, Inc. v. Bagley*, 601 F.2d 949 (8th

Cir.), *cert. denied sub nom. Iowa Beef Processors, Inc. v. Smith,* 441 U.S. 907, 99 S.Ct. 1997, 60 L.Ed.2d 376 (1979) (party seeking dissolution of protective order bears burden of showing that intervening circumstances have removed potential prejudice).

FDIC and *Martindell,* both Second Circuit decisions, are factually distinguishable from the circumstances presented in this motion.[8] In *FDIC,* Chief Judge Weinstein ordered, at defendant's request and at the time of settlement, that the settlement terms should remain secret. Two years later intervenors essentially asked for reconsideration of that decision. The trial court stated, "[t]he balance then struck has not now changed. The intervenors have placed no substantial new weight on the scale." *In Re Franklin National Bank Securities Lit.,* 92 F.R.D. 468, 472 (E.D.N.Y. 1981), *aff'd sub nom. Federal Deposit Insurance Corp. v. Ernst & Ernst,* 677 F.2d 230 (2d Cir. 1982).

In *Martindell,* the parties had agreed that depositions would be sealed. After the litigation had closed, the Government, a non-party, sought the depositions of individual defendants, now targets of a criminal investigation. Defendants had not asserted any privilege during the depositions because of the protective order. The court held that unless the Government could show that the original pro-

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[8] A third and more recent Second Circuit decision, *United States v. Davis,* 702 F.2d 418 (2d Cir. 1983), is factually distinguishable from *FDIC* and *Martindell.* The court in *Davis* allowed a grand jury access to certain documents that were only protected by a limited, informal "understanding" that they would remain confidential. *Davis,* 702 F.2d at 420. A protective order for other documents was entered into by the Bankruptcy Court, but the Second Circuit held that the trial court was within its discretion when it released the documents to the grand jury because a provision of the order permitted one of the defendants to release the same information "to any person or entity." *Id.* at 423.

tective order was improvidently granted or that some extraordinary circumstance or compelling need existed for these depositions, the witnesses were entitled to rely on the prior protective order.[9]

The distinguishing features of these cases are obvious. First, and most important, the court balanced the equities of disclosure of specific material prior to providing protection. Neither of these cases involved blanket protective orders where no showing of "good cause" is made. In *Franklin National Bank,* the protected material involved the terms of the settlement, not discovery material, and as such the standards of Rule 26(c) governing discovery were not controlling. Moreover, all the circumstances regarding the protected party's need for confidentiality were known to the court at the time the order was issued. Such full knowledge is never possible when a protective order is issued in the course of pretrial discovery, a situation inevitably subject to change.

The other cases, *Martindell* and *Iowa Beef,* concern an investigative agency's desire to obtain information produced in civil litigation pursuant to promises of confidentiality. Because this information is obviously available to governmental investigating authorities through other means in which privileges could be asserted, it is appropriate to

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[9] In *Iowa Beef,* the trial court had issued a protective order for confidential business records of plaintiff, Iowa Beef Processors, Inc. ("IBP"), that had been produced during pretrial discovery. Meanwhile, a House Subcommittee of the House Committee on Small Business subpoenaed these protected records from a defendant in that action. In an effort to comply with the subpoena the defendant moved to lift the protective order. The motion was granted by the trial court. The appellate court reversed, holding that defendant had failed to show "that intervening circumstances had in any way obviated the potential prejudice to IBP. . . ." *Iowa Beef,* 601 F.2d at 954.

shift the burden to the authority seeking the discovery to show why it is entitled to this protected information. Here, the veterans, unlike the United States government, have no other means to acquire the information produced by the private defendants. Moreover, the information is not being sought in the context of a public investigation in which the assertion of a privilege might be of critical importance.

Seattle Times tips the balance in favor of not shifting the burden. The Court in *Seattle Times* approved a limitation on First Amendment rights upon a showing of good cause. In the absence of such a showing, continued protection would violate the First Amendment, particularly in this case, which is of great interest to the public and the media.

A recent law review article considered the question of the burden of proof as it relates to seeking modifications of protective orders. After noting the variety of standards advanced by the courts, the author stated his own view:

> Given that proceedings should normally take place in public, imposing a good cause requirement on the party seeking modification of a protective order is unwarranted. If access to protected fruits can be granted without harm to legitimate secrecy interests, or if no such interests exist, continued judicial protection cannot be justified. In that case, access should be granted even if the need for the protected materials is minimal. When that is not the case, the court should require the party seeking modification to show why the secrecy interests deserve less protection than they did when the order was granted. Even then, however, the movant should not be saddled with a burden more onerous than explaining why his need for the materials outweighs existing privacy concerns.

Nonparty Access to Discovery Materials in Federal Courts, 94 *Harv.L.Rev.* 1085, 1092 (1981). (footnotes omitted).

In view of *Seattle Times,* the circumstances of this case and this court's understanding of the law, the above-quoted standard seems appropriate. If access to the discovery materials here will cause no harm to legitimate secrecy interests under Rule 26(c), then there is no further justification for these protective orders. If the release of such materials would cause actual harm, then plaintiffs must show why the secrecy interests deserve less protection than they did when the order was granted.

B. The Need for Disclosure Versus the Need for Continued Confidentiality in the "Agent Orange" Litigation

After a rather lengthy prelude it is time to reach the question before this court. In doing so I must treat separately the private and Government defendants and the specific protective orders referred to in Part I, pp. 2-4, *supra.*

1. The Private Defendants: The Blanket Protective Order.

As noted above, the blanket protective order was issued because of: the complexity of the litigation; the need for the cooperation among counsel; the need to expeditiously complete discovery; the burden on the court of reviewing documents; and the emotionalism surrounding the case. None of these reasons will now suffice to establish good cause pursuant to Rule 26(c) for the continued protection of the bulk of discovery taken pursuant to that order.

In their brief on this motion, defendants' main argument was that the materials to which plaintiffs, class members and intervenors now seek access are raw fruits of dis-

covery. "The documents are unculled, containing matters which may be irrelevant, immaterial, prejudicial or otherwise privileged from use as evidence." Defendants' Memorandum of Law in Opposition to Motion to Lift the Protective Orders Entered in These Proceedings ("Defendants Memorandum") at 12. Defendants then asserted the reliance argument, that is, that they relied on the blanket protective order in order to assist the court and the parties to expeditiously conclude the litigation. Defendants claim that it would now be unfair to order wholesale disclosure of material that has never been screened as to relevance and materiality. *Id.* at 18. Part of the unfairness would result, they assert, from the expense of claiming the need for protection as to individual documents when plaintiffs specifically agreed as part of the settlement to return the documents to the defendants after a specified period of time. *Id.* at 20. Finally, defendants' argue that discovery is still continuing in the opt-out actions, civilian actions, defendants' third party claims against the Government and plaintiffs' independent claims against the Government. *Id.* at 19. The defendants offered no additional reason for continued protection at oral argument on the motion. *See* Transcript of Hearing Before Magistrate, October 19, 1984.

It is axiomatic that a protective order may only be issued or maintained upon a showing of "good cause." Fed.R. Civ.P. 26(c). Courts have routinely required the party seeking protection to show a particular and specific need for that protection. 8 C. Wright and A. Miller, *Federal Practice and Procedure* § 2035 at 265 (1970). A showing of serious harm either to business or non-business interests is required. Ordinarily, the time-consuming or costly nature of responding to discovery requests does not entitle a party to a protective order. *See Isaac v. Shell Oil Co.*,

83 F.R.D. 428 (E.D.Mich.1979); *Marshall v. S.K.* Williams Co., 462 F.Supp. 722 (E.D.Wis. 1978).

None of the reasons and arguments set forth by defendants is sufficient to warrant the continuance of the blanket protective order issued in October of 1982. Defendants assert that because of their reliance on the protective orders, the court should not compel them now to disclose unculled materials and require them to assume the expense of doing so. I give credence to the defendants' reliance argument in two respects. They argue that, in settling the case, they relied on not having to meet the unexpected and costly burden of later reviewing the discovery documents for confidential material. In addition, defendants claim that they produced the large volume of documents under protective order to help ease the burden on the court, which otherwise would have had to spend a great deal of time making confidentiality determinations. I cannot find, however, that in itself defendants' reliance on the blanket protective order is sufficient to establish good cause for confidentiality when weighed against the presumption set forth in the Federal Rules that discovery should be concluded in public.

Defendants' first reliance argument is not persuasive because the settlement occurred literally on the eve of trial, when defendants had already conducted a thorough review of their documents.[10] Nor can I accept defendants' second

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[10] Defendants also assert that they relied on or "bargained for" the continuation of the protective order when they negotiated the Settlement Agreement. This argument is not persuasive for two reasons. First, the protection was conditional in that the documents could still be used at any future trial against the Government at which time the documents would become public. Thus, defendants were willing to settle this action even assuming disclosure of the documents. Second, defendants never bargained for, nor could they have, a commitment that neither class members nor non-party intervenors would ever seek to have the protective orders lifted or modified. Their agreement for the eventual return of documents was solely with the Plaintiffs' Management Committee.

argument because a permanent exception to the good cause requirement for cases with voluminous documents would make Rule 26(c) meaningless. Defendants do not need such an exception; they may still make a good cause showing for those documents they claim are confidential.

Defendants' next argument, that additional discovery in various actions require continuation of the blanket protective order, is disingenuous.[11] As the Magistrate supervising discovery I would surely be aware of any continuing discovery. With the exception of some discovery of the Government and the plaintiff in an action by a civilian, virtually no discovery is now in progress. Whatever discovery may yet occur should be extremely limited in view of the massive discovery undertaken in the now-settled class action. If the need for further particularized protective orders arises it can be handled in the context of the continuing discovery.

Even when good cause for the issuance of a protective order is shown, the decision to grant such an order lies in the discretion of the court. See *Koster v. Chase Manhattan Bank,* 93 F.R.D. 471, 479 (S.D.N.Y.1982). Thus, assuming *arguendo* that defendants have shown good cause for the continued protection of the discovery materials under the blanket protective order, a number of arguments have been advanced to show that the need for disclosure outweighs the need for further protection.

In recommending that the protective orders be lifted as to those materials submitted with the summary judgment

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[11] At the December 10, 1984 conference, the Court dismissed a number of actions brought by plaintiffs who opted-out of the class action, as well as a number of actions brought by veterans against the Government. Motions to dismiss the remaining actions are scheduled for February 6, 1985 and March 18, 1985.

motions, the Special Master enumerated a number of reasons favoring disclosure. At the risk of being repetitious, which is likely unavoidable in any event, I shall again quote those reasons.

> The public has an interest in learning more about the nature of the issues raised by this complex litigation involving thousands of veterans and members of their families; the plaintiffs' claim of exposure to dioxin; and the chemical companies defense that the product was harmless, produced in accordance with government specifications during warfare. Indeed, apart from the Agent Orange litigation, dioxin has sparked much public interest and debate, as contamination has been discovered in the soil of the towns and cities around the country. . . . It is this gain in public understanding which heightens the public interest in the summary judgment documents. . . .

98 F.R.D. 539, 547 (E.D.N.Y.1983). The same reasons are applicable to the remaining documents and depositions produced in discovery.

Intervenors have articulated their own reasons for seeking disclosure at this time. First, intervenors assert that the veterans, the press and the public should have an opportunity to see what evidence each party had discovered in preparation for trial. Intervenors point out that the settlement affects the rights of tens of thousands of veterans who have had no opportunity to review the evidence produced in the case. They claim that such review is now necessary so that the veterans might understand the need for and properly evaluate the settlement. I find this to be a compelling argument.

Ordinarily a party to an action does have the right to review all material produced in discovery except in the rare instance where a trade secret may not be disclosed even to a party.[12] In class actions, however, a Management Committee or lead counsel often assumes representation for the named plaintiffs. As such, those attorneys act on behalf of the entire class, not individual clients. In requiring public filing of discovery documents, in the absence of a showing of good cause for a protective order, the Advisory Committee noted that filing is required because "such materials are sometimes of interest to those who may have no access to them except by a requirement of filing, such as members of a class, litigants similarly situated, or the public generally." Fed.R.Civ.P. 5(d) Advisory Committee Note.

The present situation is exactly the one contemplated by the Advisory Committee. The attorneys for the class have reviewed the documents and made a determination that settlement is appropriate.[13] Members of the class have

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[12] One court has held that limitations on a client's right to inspect discovery material may be unconstitutional. *See In re San Juan Star Co.*, 662 F.2d 108, 118 (1st Cir. 1981) ("[T]he significance of plaintiff's right to such information can hardly be overstated . . . [T]he fundamental right to a fair trial . . . might be thought as a general rule to depend critically on one's ability to participate effectively in one's own litigation."); *Week* v. *Cross*, 88 F.R.D. 325 (N.D. Ill. 1980) (order permitting disclosure of agency investigation of defendant to plaintiffs and their counsel sufficiently protected agency's interest in confidentiality). However, in certain situations, it may be necessary to prohibit disclosure to a client. For example, disclosure may be limited where it would present a significant risk of competitive harm. *See Chesa International Ltd.* v. *Fashion Associates, Inc.*, 425 F. Supp. 234 (S.D.N.Y.), *aff'd* 573 F.2d 1288. (2d Cir. 1977).

[13] It can be argued that all of the documents reviewed by the attorneys were relied on by the Court in approving the settlement.

(footnote continued on following page)

not had that opportunity. In the absence of good cause for protection, the right of those class members to review the record weighs heavily in favor of disclosure. Continued dissatisfaction, suspicion and unease among the veterans and their families will surely continue in the absence of full disclosure. *See* Preliminary Memorandum and Order on Settlement, pp. 79-82.

Intervenors further argue that the significance of the case to the veterans who allege injury, the public, and historians also supports disclosure. In *Krause v. Rhodes,* 671 F.2d 212 (6th Cir.), *cert. denied sub nom. Attorney General of Ohio v. Krause,* 459 U.S. 823, 103 S.Ct. 54, 74 L.Ed.2d 59 (1982), the appeals court reviewed a decision of the trial court ordering disclosure of discovery material that never became a part of the public record. The case involved the Ohio National Guards' killing of four students at Kent State University on May 4, 1970. After two trials

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(footnote continued from preceding page)

Ordinarily parties may settle their actions on consent. In a class action, however, the Court must approve the settlement. Fed. R. Civ. P. 23(e). Here the attorneys for the class urged the Court to approve the settlement. *See* Plaintiffs Fairness Brief, August 7, 1984. In doing so the attorneys inevitably relied on the thousands of documents they reviewed in deciding to settle the action. Similarly, the defendants were familiar with the discovery when they offered the settlement to plaintiffs. As noted above, the Court did not review the documents filed under seal with the pretrial orders. Nonetheless, in hearing and relying on the views of counsel the Court vicariously relied on the material produced during discovery. Once a court has relied on material, that material should be disclosed. *See United States* v. *Hubbard,* 650 F.2d 293, 333 (D.C. Cir. 1981), *Wilk* v. *American Medical Association,* 635 F.2d 1295, 1299, n. 7 (7th Cir. 1980). The peculiar circumstances of a class action settlement may require a broad interpretation of reliance. Here the veteran class members should be given access to the discovery material so that they may understand why their class representatives urged the Court to approve the settlement.

that eventually resulted in a settlement, the court was asked to lift the protective orders. The trial court, in the exercise of its discretion, continued to protect that information protected by statute, namely grand jury material and personnel files of guardsmen. It also required the redaction of certain names and addresses that might cause harm or injury to individuals. The court ordered the remainder of the discovery material disclosed to the public. In affirming the trial judge's exercise of discretion, the Sixth Circuit noted that he had relied on "First Amendment interests and the historic nature of the events portrayed in the materials concerned. . . . " *Id.* at 217.

Other courts have recognized the nature and degree of the public interest as a factor in balancing the interests of the parties who seek to protect or disclose information. In *United States v. General Motors Corp.*, 99 F.R.D. 610 (D.D.C.1983) the court wrote:

> "litigation is, as a rule, supposed to be conducted in full view and the greater the public's interest in the case the less acceptable are restraints on the public's access to the proceedings."

Id. at 612. In *Brown & Williamson Tobacco Corp. v. Federal Trade Commission,* 710 F.2d 1165 (6th Cir. 1983), *cert. denied,* — U.S. —, 104 S.Ct. 1595, 80 L.Ed. 2d 127 (1984) the subject matter of the litigation weighed heavily in balancing the need for disclosure. In its decision the court wrote that the subject in litigation

> potentially involves the health of citizens who have an interest in knowing the accurate "tar" and nicotine content of the various brands of cigarettes on the market.

Id. at 1180.

The subject matter of this litigation certainly has a broader public interest element than the Kent State killings. The risks and dangers to which American soldiers were exposed during the most controversial war of this century is a matter of overwhelming public concern. It has often been said that this case is *sui generis.* It is. In the absence of a showing of good cause for protection, the requirement of public filing set forth in the Federal Rules must be strictly observed.

Intervenors next argue that disclosure would be helpful to Congress in considering Agent Orange victim compensation legislation. Whether this is helpful to individual plaintiffs or not, it does seem apparent that the Congress should be able to consider such important legislation on the basis of a full record.

Finally, intervenors contend that a full record would be useful to veterans groups in assisting those who will distribute the settlement funds. To the extent that this is so, it is yet another reason favoring full disclosure.

For all of the reasons set forth above the blanket protective order issued on October 14, 1982 is lifted. If defendants wish to designate any particular document or category of documents as confidential they may do so on notice, and by a showing of good cause. All such requests must be made within 60 days of such date as this order becomes final. Any document not so designated as of that time shall be unsealed. I will then review the documents designated as confidential to determine whether they are entitled to further protection pursuant to the standards of Rule 26(c).

2. The Private Defendants: Commercial Information

On February 6, 1981 a protective order was issued allowing defendants to designate as "confidential" those records

that they claimed contained "confidential developmental, business, research or commercial information." *See* PTO 27 para. 1. Intervenors and plaintiffs now seek access to such information.

As noted above, courts have required the moving party to show a particular and specific need for protection, especially when protection is sought pursuant to Fed.R.Civ.P. 26(c)(7). That rule allows a court to order "that a trade secret or other confidential research, development, or commercial information not be disclosed. . . ." *Id.* In *United States v. International Business Machines Corp.*, 67 F.R.D. 40 (S.D.N.Y. 1975), the court held that "an applicant will have to demonstrate that disclosure of allegedly confidential information will work a *clearly defined and very serious injury* to his business." *Id.* at 46 (emphasis in original). In *Parsons v. General Motors Corp.*, 85 F.R.D. 724, (N.D.Ga. 1980), the court interpreted the rule as requiring "the party seeking the protective order . . . [to] demonstrate that the material sought to be protected is confidential and that disclosure will create a competitive disadvantage for the party." *Id.* at 726 (footnote omitted).

Here, the defendants have never been required to make such a showing with regard to the commercial information that they claim is confidential and entitled to protection. Throughout the discovery the simple label "confidential" was sufficient to permit coverage under the 1981 protective order. Intervenors are now seeking access to such information. Surely they are entitled to the information unless good cause can be shown for its continued protection under the standards set forth above. Since the protection is now challenged, defendants should be required, for the first time, to make a showing of the need for confidentiality.

It is noteworthy that much of this material may now be 20 to 30 years old. An important factor in determining

whether disclosure will cause competitive harm is whether the information that the party seeks to protect is current or stale. For example, in *United States v. International Business Machines,* 67 F.R.D. at 48-49, the court held that information three to fifteen years old was stale and not entitled to protection. *See also Rosenblatt v. Northwest Airlines, Inc.,* 54 F.R.D. 21, 23 (S.D.N.Y. 1971) (the need for a court's protection diminished because information was one year old); *Hecht v. Pro-Football, Inc.,* 46 F.R.D. 605, 606-07 (D.D.C. 1969) (financial information up to three years old entitled to confidentiality and court's protection); *United States v. Lever Brothers Co.,* 193 F.Supp. 254 (S.D.N.Y. 1961), *cert. denied,* 371 U.S. 932, 83 S.Ct. 310, 9 L.Ed.2d 272 (1962) (court held that information three to eight years old should not be protected).

For all the reasons set forth above, the protective order of February 6, 1981 is lifted. To the extent defendants still wish to designate any particular document or category of documents as confidential under Fed.R.Civ.P. 26(c)(7) they may do so on notice and by a showing of good cause. All such requests must be made within 60 days of the date this order becomes final. Any documents not so designated as of that time shall be unsealed. I will then review the documents designated as confidential, to determine whether they are entitled to protection in accordance with the standards of Rule 26(c)(7).

3. The Government: PTO 19 and PTO 42

The only categories of Government documents remaining under seal are those covered by PTO 19, confidential medical records of the Veterans Administration and PTO 42, which protects alleged trade secrets and business confidential information in the possession of the Environmental

Protection Agency. As the Government points out, these documents are protected from disclosure by statute in the absence of a protective order. *See* United States' Memorandum in Response to Vietnam Veterans of America's Motions to Vacate or Modify Pretrial Protective Orders at 5-13. Many of the documents from the Veterans Administration ("VA") are protected by the Privacy Act, 5 U.S.C. § 552a (1976), the confidentiality statute for VA claims records, 38 U.S.C. § 3301 (Supp. V 1981), and for other medical records, 38 U.S.C. § 4132 (1976). Various statutes also protect many of the Environmental Protection Agency ("EPA") documents, such as the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. § 136h (Supp. V 1981), the Trade Secrets Act, 18 U.S.C. § 1905 (Supp. V 1981), and the Privacy Act, 5 U.S.C. § 552a (1976).

These statutes provide varying standards for disclosure, and nearly all provide for court disclosure when appropriate.[14] The different disclosure standards and public policies embodied in the statutes make it inappropriate for this court to release a large volume of documents to the public *en masse*. For example, 38 U.S.C. § 4132(b)(2)(C) allows disclosure by the VA of confidential medical records.

> [i]f authorized by an appropriate order of a court of competent jurisdiction granted after application showing good cause therefor. In assessing good cause the court shall weigh the public interest and the need for disclosure against the injury to the patient or subject, to the physician-patient relationship, and to the treatment services. Upon the granting of such order, the court, in determining the

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[14] *See, e.g.*, 5 U.S.C. § 552a (1976); 38 U.S.C. § 3301(b)(2) (Supp. V 1981); 38 U.S.C. § 4132(b)(2)(C) (1976); 18 U.S.C. § 1905 (Supp. V. 1981).

> extent to which any disclosure of all or any part of any record is necessary, shall impose appropriate safeguards against unauthorized disclosure.

Id. Congress' intent in drafting this statute was for courts to consider disclosure of these confidential documents on an individual basis, upon a specific application and showing of good cause by the party seeking disclosure. Releasing all such material for public inspection would violate individual privacy rights and defeat Congress' purpose in drafting the statute.

At least one statute that relates to the EPA documents, 7 U.S.C. § 136h, does not provide directly for court disclosure of agency documents. Subsection (b) states that

> [n]otwithstanding any other provisions of this subchapter, the Administrator shall not make public information which in his judgment contains or relates to trade secrets or commercial or financial information obtained from a person . . . [that is] privileged or confidential. . . .

Id. Subsection (c) of the statute then sets forth a procedure by which the agency notifies the individual who submitted the protected information that a request for its release has been made. The individual then has thirty days to bring a declaratory judgment action in the appropriate district court for continued statutory protection. *Id.* Such a well defined statutory policy should not be circumvented.

Several courts have dealt with the conflict between a request for documents filed in court and a statute protecting such information. The Eighth Circuit discussed the issue in the context of Title III [15] wiretaps in *In re Applications of*

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[15] Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510-20 (1976) (Title III).

Kansas City Star, 666 F.2d 1168 (8th Cir. 1981). The court outlined the text of the statute, its sealing requirements, and its legislative history and concluded that it should not disclose the documents. The statute contains a good cause standard similar to the one described above in 38 U.S.C. § 4132. Pursuant to statute, the court required the party seeking access to show good cause before it would consider releasing the documents.

> Disclosure of these documents is not a matter committed to the discretion of the district court, instead it is a matter which statutorily requires a factual finding of good cause. Access to judicial documents is based on "a general right to inspect and copy public records and documents," but "[i]t is uncontested . . . that the right to inspect and copy judicial records is not absolute." . . . Title III does not allow these documents to become "public" until there is a factual determination of good cause for their disclosure.

Kansas City Star, 666 F.2d at 1176-77 (quoting *Nixon v. Warner Communications,* 435 U.S. 589, 597-98, 98 S.Ct. 1306, 1311-12, 55 L.Ed.2d 570 (1978)) (ellipses in original, footnote omitted). *See also Krause v. Rhodes,* 671 F.2d at 217 (National Guard personnel files returned when protective order lifted); *United States v. International Business Machines Corp.,* 461 F.Supp. 732 (S.D.N.Y. 1978) (documents requested from Commerce Department kept under seal and only open to those involved in litigation).

A review of the statutes and cases demonstrates that it is inappropriate to modify Pretrial Orders 19 and 42, which cover the EPA and VA documents. The proper method for obtaining disclosure is to request specific documents

from the agencies through the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552 (1976). The FOIA states that agencies must make their records available upon request, 5 U.S.C. § 552(a)(3), unless the records fall within one of nine enumerated exemptions. 5 U.S.C. § 552(b). An individual who disagrees with an agency determination may petition the appropriate district court to conduct a *de novo* review of the request and compel production of the informaiton. 5 U.S.C. § 552(a)(4)(B).

Intervenors acknowledge that filing FOIA requests is the proper procedure for gaining access to agency information. *See* Memorandum in Support of Motion of Vietnam Veterans of America to Vacate or Modify Pretrial Protective Orders, at 23-26. They ask that the protective orders be lifted so that the agencies can process their FOIA requests without restraint.[16]

During oral argument, the Government consented to the intervenors' request that the agencies process FOIA requests that relate to documents sealed by the protective orders. Tr. 104-106. The Government stated that if the parties or intervenors make proper FOIA requests to the EPA or VA, neither agency will refuse to produce documents because of the protective orders. *Id.* The Government thus has satisfied the VVA's request. Mr. Yannacone, who represents additional veterans, stated that this arrangement was acceptable to him. Tr. 106.

Intervenors or other individuals seeking disclosure of documents protected by pretrial orders 19 and 42 must

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[16] Many of these Government documents should be released by the agency because of their age. *See, e.g.*, Dep't of State, Availability of Information and Records to the Public, 22 C.F.R. § 171.5 (1984) (department must release records to National Archives after 20 years).

make a FOIA request pursuant to 5 U.S.C. § 552 (1976). The protective orders should then be lifted simultaneously with the production of the documents by the agencies, or in conjunction with a court order that compels their production.

V. Conclusion

The various protective orders issued in the pretrial phase of the "Agent Orange" litigation are modified in accordance with the rulings set forth above.

SO ORDERED.

Opinion of the United States Court of Appeals for the Second Circuit

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 1076, 1080, 1082, 1086, 1091, 1092, 1093, 1094, 1096, 1125, 1126, 1257

August Term, 1985

(Argued April 10, 1986 Decided June 10, 1987)

Docket Nos. 85-6061, 85-6143, 85-6145, 85-6151, 85-6167, 85-6287, 85-6289, 85-6293, 85-6295, 85-6375, 85-6377, 86-6057

IN RE

"AGENT ORANGE"

PRODUCT LIABILITY LITIGATION

Before:

VAN GRAAFEILAND, KEARSE and MINER,
Circuit Judges.

Appeal from an order of the United States District Court for the Eastern District of New York (Weinstein, Ch. J.), unsealing materials produced or generated during discovery in the Agent Orange litigation, vacating two prior protective orders directing the sealing and allowing for continuation of the protective orders as to specific documents on showing of good cause.

Affirmed.

LEONARD L. RIVKIN, Garden City, NY (Leslie R. Bennett, Barbara Petraglia Aloe, Rivkin, Radler, Dunne & Bayh, Garden City, NY, Cadwalader, Wickersham & Taft, New York, NY, Kelley Drye & Warren, New York, NY, Townley & Updike, New York, NY, Clark, Gagliardi & Miller, White Plains, NY, Budd, Larner, Kent, Gross, Picillo, Rosenbaum, Greenberg & Sade, Short Hills, NJ, Shea & Gould, New York, NY, of counsel) *for Defendants-Appellants* Dow Chemical Company, Diamond Shamrock Chemicals Company, Hercules Incorporated, Monsanto Company, T H Agriculture & Nutrition Company, Thompson Chemicals Corporation and Uniroyal, Inc.

CORNISH F. HITCHCOCK, Washington, DC (Alan B. Morrison, Public Citizen Litigation Group, Washington, DC, John Catterson, Mark A. Harmon, Peter Sills, Bondy & Schloss, New York, NY, Barton F. Stichman, Vietnam Veterans of America Legal Services, Washington, DC, of counsel) *for Intervenor-Appellee* Vietnam Veterans of America.

ROBERT TAYLOR, Portland, ME (Harold L. Lichten, Barry A. Margolin, Jennifer Wriggins, Tureen & Margolin, Portland, ME, of counsel) *for Plaintiff-Appellee* Robert Grenier.

(Ralph G. Elliot, Hartford, CT, Jane E. Kirtley, Robert S. Becker, Reporters Committee for Freedom of the Press, Washington, DC, Richard N. Winfield, Rogers & Wells, New York, NY, Henry L. Baumann, Washington, DC, Steven A. Bookshester, Washington, DC, David Barr, Barr & Teer, Washington, DC, Katharine P. Darrow, New York, NY, Kenneth A. Richieri, New York, NY, J. Laurent Scharff, Pierson, Ball & Dowd, Washington, DC, Bruce W. Sanford, Baker & Hostetler, Washington, DC, of counsel) *for Amici Curiae* Reporters Committee for Freedom of the Press, Associated Press, Associated Press Managing Editors, National Association of Broadcasters, Newspaper Guild, New York Times Company, Radio-Television News Directors Association and Society of Professional Journalists, Sigma Delta Chi, *in support of Appellee* Vietnam Veterans of America.

MINER, *Circuit Judge:*

Defendants-appellants Dow Chemical Company, Diamond Shamrock Chemicals Company, Hercules Incorporated, Monsanto Company, T H Agriculture & Nutrition Company, Inc., Thompson Chemicals Corporation and Uniroyal, Inc. (collectively the "chemical companies") appeal from an order of the United States District Court for the Eastern District of New York (Weinstein, Ch. J.) unsealing materials produced or generated during discovery in the Agent Orange litigation. The materials in question

had been sealed pursuant to two prior protective orders of the district court.

In ordering the documents unsealed, the district court relied on the findings of Magistrate Scheindlin, who concluded that intervenor-appellee Vietnam Veterans of America ("VVA") and intervenor Victor J. Yannacone, as well as the Agent Orange Plaintiffs' Management Committee, which filed a brief in support of the VVA's motion, had a statutory right of access to the subject discovery materials by virtue of Fed. R. Civ. P. 26(c) and Fed. R. Civ. P. 5(d). In balancing the interests of the parties, Magistrate Scheindlin determined that the chemical companies should be required to demonstrate good cause for continuing the protective order as to any particular document or category of documents. Appellants contest the magistrate's determination and argue that the blanket protective orders should remain in force absent a showing of extraordinary circumstances or compelling need. We affirm.[1]

BACKGROUND

The extensive procedural history and general background of the Agent Orange litigation is reported in *In re "Agent Orange" Product Liability Litigation MDL No. 381*, Nos. 84-6273 *et seq.* (2d Cir. Apr. 21, 1987), familiarity with which is assumed. Only those facts relevant to the protective orders at issue will be discussed here.

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[1] In a related action heard together with the instant appeal, appellant Dow Chemical Company appealed the district court's order releasing discovery materials subject to the protective orders at issue to Robert Grenier, who individually had sued Dow Chemical in the United States District Court for the District of Maine. Our affirmance of the district court's order unsealing the discovery materials in the Agent Orange litigation obviates the need to discuss the points raised in Dow Chemical's appeal.

On February 6, 1981, Judge Pratt, then supervising the Agent Orange litigation, issued an order allowing the defendant chemical companies to designate as "confidential" any records that, in their estimation, contained "confidential developmental, business, research or commercial information." Any party receiving documents designated as "confidential" was required to refrain from disclosing them and to file them with the district court under seal, if filing was required. The documents were to be returned or destroyed at the end of the litigation. *See* Joint App. at 1689-95. Initial discovery involving the chemical companies took place pursuant to the February 6, 1981 order.

In May 1982, Special Master Schreiber, then supervising discovery in the litigation, orally issued a blanket protective order on all records produced or generated in discovery by any party, including the chemical companies and the government. The order provided that all documents and depositions were to be treated confidentially. In response to a motion filed on July 29, 1982, by CBS, Inc., the special master on October 14, 1982 signed a protective order incorporating procedures for dissemination of the discovery material, *see In re "Agent Orange" Product Liability Litigation*, 96 F.R.D. 582, 585-87 (E.D.N.Y. 1983) (Special Master's Protective Order), and submitted a memorandum in support of the order to the district court.

The October 14, 1982 protective order provided that only "designated persons," e.g., parties, their attorneys, expert witnesses, and witnesses to depositions, would have unrestricted access to the discovery material. Under the terms of the order, those persons could disseminate discovery material to undesignated people only upon the authorization of the special master, following a review procedure. The party seeking to prevent dissemination had

the burden of showing that good cause existed for continuation of the order with respect to the discovery material in question. *See* Fed. R. Civ. P 26(c). The order also included a clause indicating that the October 14, 1982 order did not supersede the February 6, 1981 order regarding production of confidential documents.

In his supporting memorandum, the special master noted that good cause for his order existed because of the "complexity of this litigation, the emotionalism surrounding the issues, the number of documents yet to be reviewed and the desirability of moving discovery expeditiously in order to meet the June 1983 trial date." 96 F.R.D. at 583. He also concluded that the protective order did not unduly restrain first amendment rights. Finally, he noted that, "as discovery progresses and fundamental disputes are resolved, it may become desirable to lift this order." Joint App. at 1750. Judge Pratt approved and adopted the special master's protective order. 96 F.R.D. at 585.

The October 14, 1982 protective order subsequently was modified on two occasions. First, on May 12, 1983, Judge Pratt granted summary judgment in favor of four of the chemical companies based on the government contractor defense. Judge Pratt directed the special master to consider whether the blanket protective order should be modified to permit disclosure of papers and exhibits filed in connection with the summary judgment motion. *In re "Agent Orange" Product Liability Litigation,* 565 F. Supp. 1263, 1277-78 (E.D.N.Y. 1983). The special master recommended that the October 14, 1982 protective order be lifted insofar as it related to "the material submitted with and referred to in the parties' summary judgment papers." *In re "Agent Orange" Product Liability Litigation,* 98 F.R.D. 539, 548 (E.D.N.Y. 1983) (Special Master's

Recommendation). Judge Pratt accepted and adopted the recommendation. *Id.* at 541. A further modification of the October 14, 1982 order, pursuant to a recommendation by the special master, was adopted by Chief Judge Weinstein, who had assumed responsibility for supervision of the Agent Orange litigation. *In re "Agent Orange" Product Liability Litigation,* 99 F.R.D. 645, 646 (E.D.N.Y. 1983). That modification permitted release, with the consent of the government, of both its employees' depositions and documents it had produced that were not otherwise subject to specific protective orders filed in the litigation.[2]

On April 23, 1984, two weeks before the trial was scheduled to commence, the parties filed their pretrial orders with the clerk, attaching all of the documents and depositions they intended to offer at trial. The orders and exhibit lists were filed publicly, and the sealed exhibits were filed in a locked room at the courthouse.

On May 7, 1984, several hours before the trial was to begin, the parties agreed to a tentative settlement, subject to the approval of the court. On June 11, 1984, a formal settlement agreement was filed. This agreement set forth in detail the terms of the settlement negotiated by the parties, subject to the approval of the district court. Paragraph 12 of the settlement agreement provided that

> [t]he attorneys for the Class shall return to each defendant, respectively, all documents in their pos-

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[2] At various times, the district court has entered specific protective orders designed to limit disclosure of particular categories of documents produced by the government, including medical files and records of the Veterans Administration, documents from a particular file of the United States Department of Agriculture, and certain documents produced by the Environmental Protection Agency. *See In re "Agent Orange" Product Liability Litigation,* 99 F.R.D. 645, 649 (E.D.N.Y. 1983).

> session or control produced by that defendant, including microfilm and all copies, within 30 days after final judgment is entered in this action and is no longer subject to appeal or review, or if plaintiffs pursue claims against the United States within one year after the date of this Agreement, within 30 days after final adjudication of those claims, whichever is later.

Joint App. at 6694-95.

Before approving the settlement, Chief Judge Weinstein held Rule 23(b) fairness hearings throughout the United States. At a hearing held in New York on August 9, 1984, a representative of the VVA requested access to all of the Agent Orange discovery materials still subject to the protective orders. At the district court's direction, the VVA filed a motion returnable before Magistrate Scheindlin on August 31, 1984. Subsequently, the Agent Orange Plaintiffs' Management Committee and Victor Yannacone, Jr., counsel for certain plaintiffs in this litigation, joined in the VVA's motion.

Before the VVA's motion was argued, the district court issued a preliminary order on September 25, 1984, tentatively approving the settlement. *In re "Agent Orange" Product Liability Litigation,* 597 F. Supp. 740 (E.D.N.Y. 1984) ("Settlement Opinion"). Chief Judge Weinstein addressed a number of concerns raised during the course of the fairness hearings, including the concern that there be no "cover-up" of information contained in the sealed files. *Id.* at 769-70. He observed that the veterans' concern about non-disclosure, "while understandable, is not an appropriate reason for rejecting the settlement." *Id.* at 770. The district court noted that it retained the power to order documents released despite the fact that they were sealed

as part of a settlement. The court directed that until the Agent Orange litigation was completed, no documents should be destroyed. In addition, Chief Judge Weinstein directed that the parties "file all depositions and other papers obtained in discovery in a depository at the courthouse in accordance with directions to be provided by a Magistrate who will determine sealing and disposition subject to appeal to the court." *Id.*

The VVA's motion subsequently was argued before Magistrate Scheindlin, who ordered that non-privileged records subject to the February 6, 1981 and October 14, 1982 protective orders be unsealed. *In re "Agent Orange" Product Liability Litigation,* 104 F.R.D. 559, 562 (E.D. N.Y. 1985) (Magistrate's Pretrial Order No. 33, dated December 17, 1984) (*"Protective Orders Opinion"*). Magistrate Scheindlin noted that the records at issue fell within two categories: records accompanying the parties' pretrial orders, which were filed with the clerk, stored in the courthouse, and later removed by the parties when the settlement was announced, and all other records produced during discovery, which the parties were required to file with the district court pursuant to the court's September 25, 1984 order. Judge Weinstein adopted Magistrate Scheindlin's order, *id.* at 562, but issued a stay pending final disposition of appeals from the district court's approval of the Agent Orange settlement. This appeal followed.

DISCUSSION

Appellants raise three arguments on appeal. First, they contend that the order unsealing the discovery materials improperly alters an integral term of the settlement agreement reached with the plaintiff class. Second, they claim that the public has no right of access to the discovery ma-

terials at issue. Finally, they argue that once a protective order has been entered and relied on, it can be modified only if extraordinary circumstances or compelling needs warrant the requested modification. We discuss appellants' contentions *seriatim*.

A. *Alteration of the Settlement Agreement*

Appellants contend that paragraph 12 of the settlement agreement, providing for return to appellants of documents obtained during discovery, was an integral part of the agreement, and that the district court's order unsealing the discovery materials improperly alters a term of the settlement agreement. We disagree.

When Judge Pratt entered the February 6, 1981 order, he specifically limited its applicability to the pretrial stages of the litigation and indicated that the issue of confidentiality would again be addressed once the trial was scheduled to commence. Joint App. at 1695. As to the October 14, 1982 protective order, appellants were on notice virtually from the time it was issued that the district court's order might be lifted or modified. In his memorandum in support of the order, the special master noted that it might be desirable to lift the order "as discovery progresses and fundamental issues are resolved." *Id.* at 1750. Later, when questions were raised during the fairness hearings regarding whether veterans and the public would have access to all discovery materials, Chief Judge Weinstein directed the VVA to move to have the protective orders lifted. At the time he tentatively approved the settlement agreement, Chief Judge Weinstein emphasized the court's inherent power to order documents released, and he directed the parties to file *all* discovery materials at the courthouse. *Settlement Opinion,* 597 F. Supp. at 770.

Despite ample indications that the protective orders might be lifted, appellants never sought to be released from the settlement agreement, nor do they seek that relief here. Moreover, the terms of paragraph 12 contemplated that some of the protected materials eventually might be introduced into evidence during the plaintiff class' then-pending suit against the United States, and therefore would become part of the public record. Appellants also were aware that the materials, once discovered, could be introduced into evidence in many non-class suits then pending. More importantly, appellants doubtless were aware that, regardless of the terms of the settlement agreement reached between the chemical companies and the plaintiff class, such an agreement could not prevent interested non-class member parties from intervening to seek access to the discovery materials. We therefore have difficulty accepting appellants' assertion that "maintenance of the protective orders *was* a *sine qua non* of the settlement and was central to resolution of the litigation." Appellants' Reply Brief at 9 (emphasis in original).

We recognize that the district judge generally should not dictate the terms of a settlement agreement in a class action. Rather, "he should approve or disapprove a proposed agreement as it is placed before him and should not take it upon himself to modify its terms," *In re Warner Communications Securities Litigation*, 798 F.2d 35, 37 (2d Cir. 1986) (citing *Plummer* v. *Chemical Bank*, 668 F.2d 654, 655 n.1 (2d Cir. 1982)), subject to certain limited exceptions, *see, e.g., Jones* v. *Amalgamated Warbasse Houses, Inc.*, 721 F.2d 881, 884-85 (2d Cir. 1983) (district court has discretion to modify attorneys' fee agreement submitted as part of proposed settlement of class action civil rights suit), *cert. denied*, 466 U.S. 944 (1984); *Beecher* v. *Able*,

575 F.2d 1010, 1016 (2d Cir. 1978) (district court has discretion to modify settlement agreement with respect to allocation of settlement proceeds when use of formula for allocation under agreement would lead to inequitable results). However, the language of the settlement agreement to which appellants direct our attention contains no reference to maintaining the confidentiality of the discovery materials, and our independent review of the agreement reveals no such clause. By its express terms, paragraph 12 mandates only that attorneys for the class must return to appellants any documents produced during discovery. Therefore, appellants did not bargain for or procure the continued confidentiality of the discovery materials by private agreement; rather the confidentiality of those documents was ensured solely by independent judicial acts, i.e., the protective orders.

It is undisputed that a district court retains the power to modify or lift protective orders that it has entered. *See Palmieri* v. *New York*, 779 F.2d 861, 864-65 (2d Cir. 1985); *United States* v. *GAF Corp.*, 596 F.2d 10, 16 (2d Cir. 1979); *see also* 8 C. Wright, A. Miller & F. Elliot, Federal Practice and Procedure § 2043, at 143-44 (Supp. 1986); *cf. United States* v. *Davis*, 702 F.2d 418, 422-23 (2d Cir.) (informal understanding of confidentiality), *cert. denied*, 464 U.S. 1215 (1983). Therefore, appellants can claim only that, by lifting the protective orders in this case, the district court effectively modified paragraph 12 in that counsel for the plaintiff class no longer are able to return the discovery materials to appellants once those documents become part of the public record. However, to the extent that the district court "modified" the settlement agreement, we hold that such an incidental modification was not an abuse of the district court's discretion under the

circumstances of this case, *cf. Beecher,* 575 F.2d at 1016; *Zients* v. *LaMorte,* 459 F.2d 628, 629-30 (2d Cir. 1972) (district court overseeing settlement distribution has inherent power to accept late claims despite contrary terms of agreement), and we note that, despite this "modification," appellants have not sought rescission of the settlement agreement.

B. *Right of Access*

Magistrate Schiendlin, in an opinion adopted by the district court, determined that both Rule 26(c) and Rule 5(d) of the Federal Rules of Civil Procedure "require that discovery is presumptively open to public scrutiny unless a valid protective order directs otherwise," *Protective Orders Opinion,* 104 F.R.D. at 568, and that, as a result, appellee had a statutory right of access to the subject discovery materials. Appellee, joined by *amici curiae,* urges us to affirm the district court's order on constitutional, common law and statutory grounds. Because we hold that the statutory right of access relied on by the district court sufficiently supports the court's order, we need not discuss the other grounds raised on appeal.

Rule 26(c) provides, in pertinent part, that "[u]pon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court . . . may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense. . . ." Fed. R. Civ. P. 26(c). A plain reading of the language of Rule 26(c) demonstrates that the party seeking a protective order has the burden of showing that good cause exists for issuance of that order. It is equally apparent that the obverse also is true, i.e., if good cause is not shown, the discovery materials

in question should not receive judicial protection and therefore would be open to the public for inspection. *Cf. Seattle Times Co. v. Rhinehart,* 467 U.S. 20, 37 (1984) (approving trial court's finding, under Washington state statute identical to Rule 26(c), that party seeking protective order had shown good cause for issuance of order; implicit conclusion that information would have been available to public absent demonstration of good cause). Any other conclusion effectively would negate the good cause requirement of Rule 26(c): Unless the public has a presumptive right of access to discovery materials, the party seeking to protect the materials would have no need for a judicial order since the public would not be allowed to examine the materials in any event.

Fed. R. Civ. P. 5(d) requires that all discovery materials must be filed with the district court, unless the court orders otherwise. However, due to the volume of discovery materials in the Southern and Eastern Districts of New York, this requirement has been altered by local rule, which provides that "depositions, interrogatories, requests for documents, requests for admissions, and answers and responses shall not be filed with the Clerk's Office except by order of the court." SDNY, EDNY Civ. R. 18(a). *See Scheindlin, Discovering the Discoverable: A Bird's Eye View of Discovery in a Complex Multi-District Class Action Litigation,* 52 Brooklyn L. Rev. 397, 407 n.35 (1986). Appellants disparage Rule 5(d) as merely a housekeeping rule, but an examination of the notes accompanying Rule 5(d) reveals substantive policy considerations underlying the Rule.

The Advisory Committee note accompanying Rule 5(d) discloses that the Committee originally had contemplated incorporating into Rule 5(d) a procedure similar to that

now in effect in the Southern and Eastern Districts, but decided instead to require filing of discovery materials because "such materials are sometimes of interest to those who may have no access to them except by a requirement of filing, such as members of a class, litigants similarly situated, or the public generally." Fed. R. Civ. P. 5(d) advisory committee note. As Judge Mansfield, then Chairman of the Advisory Committee on Civil Rules, noted at the time of the Rule's amendment, the drafters of Rule 5(d)

> anticipate[d] (and so stated in our committee notes accompanying the proposal) that a judge would not be expected to excuse parties from filing materials in any case in which the public or the press has an interest, such as a Watergate or similar scandal. Moreover, should the public importance of the material not appear until after filing has been excused, it is expected that the judge, upon motion of the press or other interested persons, would order the parties to file the documents for inspection.

N.Y. Times, Aug. 2, 1980, at 20, col. 4 (letter to the Editor). Moreover, when the Advisory Committee proposed amending Rule 5(d) in 1978 so that it would function similarly to Local Rule 18(a), it offered the following caveat:

> any party may request that designated materials be filed, and the court may require filing on its own motion. It is intended that the court may order filing on its own motion at the request of a person who is not a party who desires access to public records, subject to the provisions of Rule 26(c).

Fed. R. Civ. P. 5(d) advisory committee note (1978 proposed amendments), *reprinted in* 77 F.R.D. 613, 623

(1978). The Advisory Committee notes make clear that Rule 5(d), far from being a housekeeping rule, embodies the Committee's concern that class action litigants and the general public be afforded access to discovery materials whenever possible. Moreover, we note that access is particularly appropriate when the subject matter of the litigation is of especial public interest, which certainly is true of the Agent Orange litigation. Therefore, we agree with Magistrate Scheindlin's determination, adopted by the district court, that Rule 5(d) and Rule 26(c) provide a statutory right of access to the discovery materials in question.

Appellants raise an additional point regarding the scope of the district court's Rule 5(d) order, which required appellants to file all discovery materials with the court. They assert that documents produced for discovery and inspection in response to Rule 34 document requests are not "papers" within the meaning of Rule 5(d). Rule 34, unlike other rules governing discovery, does not provide that responsive material be filed with the court and made part of the public record. *See In re Halkin,* 598 F.2d 176, 191 n.26 (D.C. Cir. 1979). However, the district court's order clearly required the filing of all discovery materials, including those made available for inspection. While such documents technically may not fall within the terms of Rule 5(d), we find no abuse of discretion in the district court's order in light of the district court's broad supervisory authority in class actions. It would make little sense to allow access to documents requesting inspection of discovery materials and documents facilitating the inspection of discovery materials, without allowing access to the discovery materials themselves. We emphasize that Magistrate Scheindlin set forth a procedure whereby appellants can seek continued protection

for any discovery materials in the Agent Orange litigation. Appellants thereby can ameliorate the effect of the district court's order requiring the filing of all discovery materials and its subsequent order unsealing those materials.

C. *Standard for Modifying Protective Orders*

As discussed above, there is no question that a Rule 26(c) protective order is subject to modification. Whether to lift or modify a protective order is a decision committed to the sound discretion of the trial court. *Krause* v. *Rhodes,* 671 F.2d 212, 219 (6th Cir.), *cert. denied,* 459 U.S. 823 (1982). Appellants contend that this circuit requires that "[o]nce a confidentiality order has been entered and relied upon, it can only be modified if an 'extraordinary circumstance' or 'compelling need' warrants the requested modification." *Federal Deposit Ins. Corp.* v. *Ernst & Ernst,* 677 F.2d 230, 232 (2d Cir. 1982) (per curiam) (citation omitted); *see Palmieri* v. *New York,* 779 F.2d 861, 865 (2d Cir. 1985); *Martindell* v. *International Tel. & Tel. Corp.,* 594 F.2d 291, 295 (2d Cir. 1979). Magistrate Scheindlin determined, however, that the cases cited by appellants were inapplicable to the Agent Orange litigation, and concluded that the burden of proof should remain with the proponents of continued protection. We need not reach that issue, however, because, assuming without deciding that the *Ernst & Ernst* standard applies, appellee has demonstrated both that appellants reasonably could not have relied on the protective orders and that extraordinary circumstances warrant modification.

In each of the cases cited by appellants, the parties seeking the protective order relied on the *permanence* of that order. In *Martindell,* the parties entered a stipulation of confidentiality ensuring that the material provided would

not be used for any purpose other than preparing for and conducting the litigation between them. *Martindell,* 594 F.2d at 293. In *Palmieri,* the protective order specifically was entered to prevent subsequent inquiry by a government agency, thereby encouraging settlement negotiations. *Palmieri,* 779 F.2d at 863. In *Ernst & Ernst,* the settlement expressly was made contingent upon a court order ensuring the confidentiality of the settlement terms. *Ernst & Ernst,* 677 F.2d at 231. In contrast, as discussed above, appellants in the Agent Orange litigation could not have relied on the permanence of the protective order. The February 6, 1981 order by its very terms was applicable solely to the pretrial stages of the litigation. Judge Pratt specifically indicated that the confidentiality issue would be reconsidered upon commencement of the trial. The fact that the litigation resulted in a settlement rather than a trial does not alter the temporary nature of the February 6, 1981 order. Similarly, appellants had ample warning that the October 14, 1982 order was of a temporary nature: Any reliance on such a sweeping, temporary protective order simply was misplaced.

More significantly, appellants never have been required to demonstrate good cause for shielding any document from public view. Under the February 6, 1981 order, appellants needed only to designate discovery materials as confidential to protect them. Under the October 14, 1982 order, all materials were protected regardless of whether appellants themselves considered protection to be necessary. We conclude that the exceptionally pervasive protection granted appellants during the pretrial stages of this litigation, coupled with the fact that appellants never were required to show good cause as mandated by Rule 26(c), amounts to the type of extraordinary circumstances contemplated in our prior decisions. Although we believe that the

unusual scope of the Agent Orange litigation warranted imposition of the protective orders at issue, we note that, had the district court not lifted the orders, we would be compelled to find that the orders had been improvidently granted because the district court never required appellants to make the requisite good cause showing. Improvidence in the granting of a protective order is yet another justification for lifting or modifying the order. *See Martindell,* 594 F.2d at 296. We are satisfied, however, that the district court properly entered the orders initially as temporary measures, and properly lifted them thereafter.

Appellants argue that the cost of poring through the voluminous discovery materials in the Agent Orange litigation would be prohibitive. However, appellants would have had to bear that cost during the pretrial stages of the litigation except for the protective orders. The orders merely delayed a document-by-document assessment; they did not obviate the need for such an assessment. Moreover, appellants' assertion is somewhat disingenuous in that many of the discovery materials previously had been designated as confidential, and many more were examined and catalogued in preparation for trial. Any inconvenience to which appellants are subjected certainly is outweighed by the enormous public interest in the Agent Orange litigation and the compelling need for class members and non-class members alike to evaluate fully the efficacy of settling this litigation. Under the circumstances, we hold that the district court was well within its discretion to lift the protective orders at issue, subject to a showing, on an individualized basis, of good cause for continued protection.

CONCLUSION

Based on the foregoing, the order of the district court lifting the protective orders in the Agent Orange litigation is affirmed.

Order of the Second Circuit dated July 17, 1987

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 17th day of July one thousand nine hundred and eighty-seven.

IN RE

"AGENT ORANGE" PRODUCT LIABILITY LITIGATION

Docket Nos.: 85-6061, 6143, 6145, 6151, 6167, 6287, 6289, 6293, 6295, 6375, 6377, 86-6057

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the Defendant-Cross-Appellants THE DOW CHEMICAL COMPANY, et al.

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

/s/ ELAINE B. GOLDSMITH
Elaine B. Goldsmith

Filed: July 17, 1987

Order of the Second Circuit dated July 17, 1987

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the seventeenth day of July one thousand nine hundred and eighty-seven.

Present:

HON. ELLSWORTH A. VANGRAAFEILAND
HON. RALPH K. WINTER
HON. ROGER J. MINER
HON. ELLSWORTH A. VANGRAAFEILAND
HON. AMALYA L. KEARSE
HON. ROGER J. MINER

Circuit Judges,

IN RE

"AGENT ORANGE" PRODUCT LIABILITY LITIGATION

Docket Nos.: 84-6273, 6321, 85-6035, 6051, 6083, 6261, 6265, 6301, 86-6303, 85-6307, 6323, 6325, 6327, 6329, 85-6335, 85-6349, 85-6371, 85-6373, 85-6379, 85-6381, 85-6385, 85-6387, 6393, 6395, 6411, 86-3039, 3042, 6171, 6173, 6174, 85-6163, 6269, 6337, 85-6091, 6093, 6095, 86-6117, 85-6161, 6223, 6339, 6341, 85-6153, 6165, 6225, 6231, 6263, 6287, 6289, 6293, 6295, 6375, 6377, 85-6365, 85-6305, 6325, 6343, 6345, 6347, 6351, 6353, 6355, 6357, 6359, 6361, 6363, 6383, 6389, 6397, 85-6061, 85-6143, 85-6145, 85-6151, 85-6167, 85-6287, 85-6289, 85-6293, 85-6295, 85-6375, 85-6377, 85-6057,

Order of the Second Circuit

It is hereby ordered that the mandates in all cases in the Agent Orange Liability Litigation are stayed until August 7, 1987, on the condition that petition(s) for writ of certiorari be filed in the United States Supreme Court on or before that date. In the event that a petition is not filed in any particular case, the mandate will issue in that case on August 10, 1987.

For the Court.

/s/ ELAINE B. GOLDSMITH
Elaine B. Goldsmith

Filed: July 17, 1987

Supreme Court, U.S.
FILED
SEP 10 1987
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 87-224

IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

THE DOW CHEMICAL COMPANY, *et al.*,
Petitioners,

v.

MICHAEL F. RYAN, *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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September 1987

CASILLAS PRESS INC. – 1717 K STREET NW WASHINGTON DC 20036 – 223-1220

QUESTION PRESENTED*

Did the court of appeals err in declining to overturn the ruling of the trial judge who, in the course of approving a class action settlement, ordered disclosure of non-confidential records produced by the defendants during the litigation, as a means of assuring that class members and the public would understand and have confidence in the fairness of the settlement?

*All parties were identified in the petition. Respondent Vietnam Veterans of America is a not-for-profit New York corporation which has no parent companies, subsidiaries or corporate affiliates.

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IN THE

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THE DOW CHEMICAL COMPANY, *et al.*,
Petitioners,

v.

MICHAEL F. RYAN, *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

Respondent Vietnam Veterans of America ("VVA") respectfully asks the Court to deny the petition for a writ of certiorari in this case, the opinion in which is now reported at 821 F.2d 139 (2d Cir. 1987). Although petitioners name both the class representatives and VVA as respondents, VVA raised the issues presented here in the district court and litigated them there and on appeal. We are advised that the Agent Orange Plaintiffs' Management Committee, on behalf of the class respondents, supports denial of the petition; thus, this will be the only brief in opposition.

STATEMENT OF FACTS

Respondent VVA is a non-profit corporation with 35,000 members in 320 chapters across the country, and

some of its members are members of the plaintiff class. VVA has been recognized by the Veterans Administration as a veterans' service organization under 38 C.F.R. § 14.628 (1986), and it operates a claims service program for veterans dealing with the VA and provides other services to Vietnam veterans.

The petition's recitation of the facts is very sparse. Because the facts are vital to an understanding of the decisions below and why certiorari should be denied, this brief will set forth the facts in sufficient detail to enable the Court to put the petition in the proper context.

At issue here are two protective orders in the "Agent Orange" litigation, conducted in the United States District Court for the Eastern District of New York, in which a class of Vietnam veterans claimed that they were injured by their exposure to certain herbicides manufactured by petitioners (the "chemical companies"). The first of these orders, issued by District Judge Pratt on 6 Feburary 1981 (Pet. App. 1a-6a), allowed the chemical companies to designate as "confidential" any record produced in discovery which contained "developmental, business, research or commercial information" (Pet. App. 1a). This order regulated how these "confidential" records were to be used or disclosed, required parties to return or destroy these documents when the case was over, and specified how parties could seek to modify the order (Pet. App. 2a, 4a, 6a).

The second order was a blanket seal on all discovery materials, which was orally imposed in May 1982 by the Special Master who was supervising discovery (Pet. App. 7a-8a). Two months later, CBS sought access to non-classified, non-confidential records; the Special Master denied that motion on 14 October 1982 and formally entered this seal (Pet. App. 7a-14a; 22a-25a). In finding "good cause" for this order, the Special Master cited the

complexity of the case, the need to expedite discovery, the emotionalism surrounding the case, and the sensitive nature of some records (Pet. App. 22a). He stated that "as discovery progresses and fundamental disputes are resolved, it may become desirable to lift this order," adding that it would be re-examined after 120 days upon the motion of any party (Pet. App. 14a) and that it was not intended to displace the procedures set out in the order regulating "confidential" commercial records (Pet. App. 24a). CBS appealed this ruling to Judge Pratt, who approved and adopted the blanket seal (Pet. App. 15a-25a).

Although the petition fails to mention this fact, the district court twice lifted the blanket seal to permit disclosure of sealed records. On 21 June 1983, after Judge Pratt had granted summary judgment to several chemical companies based on the "government contract" defense, he unsealed the papers and exhibits filed in connection with those motions. *In re "Agent Orange" Product Liability Litigation,* 98 F.R.D. 539, 546-48. On 31 October 1983, Chief Judge Weinstein (who had assumed responsibility for the case) unsealed depositions of government employees and all agency records that were not covered by a more specific protective order. *In re "Agent Orange" Product Liability Litigation,* 99 F.R.D. 645. Both opinions found that the public's interest in access to these records outweighed the risk of possibly prejudicial publicity to the companies, 98 F.R.D. at 546-48 and 99 F.R.D. at 648-50. The latter opinion noted that "despite defendants' dire predictions," the release of hundreds of documents submitted in connection wtih the summary judgment motions "appeared to have had little, if any, effect on the conduct of the litigation to date." 99 F.R.D. at 650.

The petition also fails to note that a large number of the documents at issue here were not simply produced in dis-

covery, but were organized and filed with the clerk in anticipation of their use at trial. On 23 April 1984, two weeks before the trial was scheduled to begin, attorneys for both sides filed their pretrial submissions and exhibit lists, along with all of the documents and depositions that they contemplated using as exhibits at trial. While the exhibit lists were publicly filed, the exhibits themselves — which would be made public under the decision below — were filed under seal and kept in a locked room in the courthouse until after the settlement was announced, when each party retrieved its exhibits (Pet. App. 33a-34a & n.3).

On 7 May 1984, several hours before the trial was set to begin, the parties reached a tentative settlement, with both sides reserving the right to litigate against the United States. The Stipulation of Settlement signed that day did not require that discovery materials be returned to the chemical companies, although such a provision was inserted as paragraph 12 of the formal settlement agreement dated 11 June 1984, which (like the earlier stipulation) was expressly made subject to the court's approval under Rule 23(e), Fed. R. Civ. P. That paragraph also provided that if the plaintiffs sued the government within one year from the date of the agreement, their attorneys were not obliged to return the documents until 30 days after the conclusion of those proceedings (Pet. App. 69a-70a). *See In re "Agent Orange" Product Liability Litigation,* 597 F. Supp. 740, 862-66 (E.D.N.Y. 1984).

Because the case was a class action which involved many parties, Chief Judge Weinstein held eleven days of fairness hearings at five cities around the country. At the fairness hearing in New York on 9 August 1984, respondent VVA raised the issue of access to the sealed records and was instructed by the judge to file a motion, returnable before Magistrate Scheindlin (who had assumed responsibility for

supervising discovery and other matters), which VVA did on 31 August 1984 (Pet. App. 70a).[1]

On 25 September 1984, before VVA's motion was argued, Chief Judge Weinstein issued an opinion which concluded that the settlement was reasonable. *In re "Agent Orange" Product Liability Litigation, supra,* 597 F. Supp. at 746-48. He noted that a number of veterans had complained about a possible "coverup" of information about the hazardous effects of Agent Orange; while he found this concern to be "understandable," he said it was "not an appropriate reason for rejecting the settlement." *Id.* at 769-70. Responding to that concern, however, he directed that until the Agent Orange case was finally concluded, no documents were to be destroyed, and the parties were expected to file at the courthouse all depositions and other papers obtained in discovery (including all documents previously filed) in conformity with instructions to be provided by the Magistrate. *Id.*

The Magistrate heard argument on VVA's motion to unseal all discovery records which did not contain commercially "confidential" information, and VVA was supported by the Agent Orange Plaintiffs' Management Committee and Victor J. Yannacone, an attorney for some of the plaintiffs. On 17 December 1984, the Magistrate issued an opinion lifting the protective orders, but allowing the chemical companies to maintain a seal on any records for which "good cause" existed (Pet. App. 28a-62a). The petition to this Court never explains the reasons why this order was entered or why it was affirmed by the district judge

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[1] Although VVA was denied formal intervenor status in the case, it was allowed to litigate the merits of these sealing orders, as have nonparties in other cases involving access to court records or proceedings. *E.g., Press-Enterprise Co. v. Superior Court,* 106 S. Ct. 2735 (1986); *Globe Newspaper Co. v. Superior Court,* 457 U.S. 596 (1982).

and the court of appeals. However, such a recitation will demonstrate why the petition is essentially a complaint that the district court improperly exercised its discretion, which is not a basis for this Court to grant review.

The Magistrate's opinion began with Rule 5(d), Fed. R. Civ. P., under which "All papers after the complaint required to be served upon a party shall be filed with the court," although a court may excuse parties from filing "depositions upon oral examination and interrogatories, requests for documents, requests for admission, and answers and responses thereto." Here, a local court rule exempted parties from filing these discovery materials; thus, apart from the trial exhibits filed in April 1984 and any exhibits filed in connection with pretrial motions, no discovery material had been filed with the clerk (Pet. App. 33a-35a).

The Magistrate thus ordered the parties to file all discovery materials with the clerk, citing the advisory committee notes accompanying the 1980 amendment to Rule 5(d) (Pet. App. 52a) and noting that this procedure was explicitly endorsed by Judge Mansfield, then Chairman of the Advisory Committee on Civil Rules, who wrote that "a judge would not be expected to excuse parties from filing materials in any case in which the public or the press has an interest" and that "should the public importance of the material not appear until after filing had been excused, it is expected that the judge, upon motion of the press or other interested persons, would order the parties to file the documents for inspection" (Pet. App. 35a n.4).

The Magistrate then considered whether the protective orders should remain in effect. After weighing the competing interests, she found "compelling" the argument that class members, other veterans, the press and the public generally "should have an opportunity to see what evi-

dence each party had discovered in preparation for trial" (Pet. App. 51a). She noted that litigants are normally entitled to review discovery documents, that the settlement affected the legal rights of tens of thousands of veterans who had no opportunity to evaluate the strength or weakness of their case, and that lifting the protective orders would allow class members to "understand the need for and properly evaluate the settlement" (Pet. App. 51a). Citing the concerns and opposition to the settlement voiced during the fairness hearings, she stated: "Continued dissatisfaction, suspicion and unease among the veterans and their families will surely continue in the absence of full disclosure" (Pet. App. 53a). She noted the public interest in the Agent Orange case, adding that a full public record might help Congress in deliberating about any victim compensation legislation (Pet. App. 55a).

The Magistrate found these concerns sufficient to outweigh the chemical companies' claims that they had bargained for secrecy in settling the case and that culling the records in order to identify "confidential" records would be burdensome. The opinion noted that the secrecy element of the settlement was conditional and subject to the district court's approval. Second, the agreement expressly contemplated that the sealed records might be disclosed in a later suit against the government. Third, the case was settled immediately prior to trial, after the parties had culled many of the documents for use at trial. Finally, since expediting discovery was the principal "good cause" for the blanket seal, the opinion expressed concern that the companies' argument could lead to a "permanent exception to the good cause requirement for cases with voluminous records, which would make Rule 26(c) meaningless" (Pet. App. 49a-51a).

The chemical companies appealed to Chief Judge Weinstein. After briefing and oral argument, he affirmed the Magistrate "for the reasons stated in her opinion and by the court on the record" and ordered the opinion "published as a Memorandum and Order of this court," but stayed its effect pending the outcome of appeals from his approval of the settlement (Pet. App. 27a).

The companies then appealed to the Second Circuit, which heard this appeal in tandem with all other Agent Orange appeals. In a series of nine opinions issued on 21 April 1987 and reported at 818 F.2d 145, the court unanimously upheld the district court's handling and settlement of the case in every major respect. On 10 June 1987, the panel unanimously affirmed the order at issue here in an opinion written by Judge Miner and joined by Judges Van Graafeiland and Kearse (Pet. App. 63-81a).

The court of appeals rejected the companies' claim that the order impermissibly altered an integral part of the settlement agreement, citing the "ample indications" throughout the case that the protective orders might be lifted, the companies' awareness that the records might be introduced in other cases, and the fact that even if they reached agreement with the plaintiffs' attorneys, other parties might intervene to obtain access to the documents (Pet. App. 73a). The panel added that even if the order could be regarded as a "modification," it was at best "incidental" and within the district court's discretion in disposing of this case (Pet. App. 74a-75a).

The court also upheld the district court's interpretation of Rules 5(d) and 26(c) (Pet. App. 75a-79a), as well as the decision unsealing these records. The court noted that some of its decisions had held that a seal could be modified only if there existed an "extraordinary circumstance" or "com-

pelling need" for access. The court did not decide whether that standard or a less demanding standard should be used in this case because it held that the district court's ruling was a proper exercise of its discretion, even under that rigorous standard urged by the chemical companies (Pet. App. 79a-81a).

The court of appeals stressed that the protective orders were intended to be temporary and limited to the pretrial phase of the case, adding that they were warranted in light of the "unusual scope" of the Agent Orange litigation and were properly lifted thereafter (Pet. App. 81a). The court labelled "disingenuous" the companies' argument that the modification order would be burdensome, noting that they had already culled the records prior to trial and that any inconvenience "certainly is outweighed by the enormous public interest in the Agent Orange litigation and the compelling need for class members and non-class members alike to evaluate fully the efficacy of settling this litigation" *(id.)*.

The panel denied the companies' petition for rehearing on 17 July 1987, and no judge on the court requested a vote on their suggestion that the case be reheard *en banc* (Pet. App. 82a).

REASONS WHY THE WRIT SHOULD BE DENIED

The writ should be denied because the decision below does not conflict with any decision of this Court, nor is the question presented sufficiently important to warrant review.

1. The chemical companies argue (at 7-8) that the decision below conflicts with *Seattle Times Co. v. Rhinehart,* 467 U.S. 20 (1984), but there is no conflict. *Seattle Times* held that a pretrial protective order, entered on a proper

showing of "good cause" under a state law identical to Rule 26(c), was not a prior restraint which violated the First Amendment. By contrast, this case involves a district court's determination, pursuant to Rule 26, that the "good cause" for secrecy which existed at earlier phases of the case was no longer present and that the seals should be lifted, as indeed they had been on two prior occasions. *Seattle Times* thus allows a district court to enter a protective order when there is "good cause" for doing so, but, as both lower courts recognized, that case does not prevent a court from modifying that protection later on (Pet. App. 37a-38a, 75a-76a).

If anything, *Seattle Times* counsels against granting the petition. As this Court stated, the "trial court is in the best position to weigh fairly the competing needs and interests of parties affected by discovery" and has "substantial latitude in fashioning protective orders." *Id.* at 36 (footnote omitted). Petitioners' real complaint here is that they disagree with the district court's conclusion about how the competing interests should be balanced, yet that disagreement affords no basis for granting their petition.

2. Apart from the *Seattle Times* point, petitioners repeat a number of arguments which were unsuccessfully raised below, none of which warrants granting the petition.

The petition states (at i) that this case presents the question of whether Rules 5(d) and 26(c) allow a non-party to "examine any discovery materials in any case, without any showing of need, regardless of whether the case has any merit, and regardless of the time of the request." Respondent's Statement of Facts makes it clear, however, that this "question" is not presented here.

As the court of appeals noted, the proposed settlement was unsatisfactory to many class members and actually

"increased the controversy surrounding the case." 818 F.2d at 150. The district court recognized this fact during the fairness hearings, and it entered this disclosure order in an effort to bolster the plaintiffs' and the public's confidence in the fairness of the settlement. That was surely a proper concern in this case. Nor can it be said that the motion was made by some "non-party" with no regard to "time." The unsealing motion was made by a national veterans organization whose members include class members, and VVA raised this issue at the first available opportunity. Nor does this case involve access to "any" discovery material, since the district court explicitly allows records to be withheld on a showing of "good cause."

Thus, even if the Court should be concerned with the issues which the petition tries to raise, this case is a poor vehicle for addressing them. The decision below was grounded in the facts presented here, and hence the argument that the decision will somehow unleash frivolous lawsuits aimed at extracting information from defendants (Pet. at 9-11) is overstated if not wholly speculative. Moreover, district courts have ample means to prevent abuses of the judicial process by imposing sanctions on parties and lawyers who act improperly.

The petition also argues (at 11-13) that the decision below misinterpreted Rules 5(d) and 26(c), but it cites no authority to contradict the lower courts' legal analysis. It also fails to mention that a number of these records were previously filed with the clerk and that the refiling order is consistent with the notes of the Advisory Committee and the advice of its Chairman. The district court was thus on solid ground when it ordered the filing of these documents, along with other "depositions upon oral examination and interrogatories, requests for documents, requests for admission, and answers and responses thereto," which Rule 5(d) specifies should normally be filed.

The petition focuses on the fact that the refiling order covers not only these documents, but also records produced in response to Rule 34 production requests, which would normally not be filed under Rule 5(d). The court of appeals acknowledged that these Rule 34 materials "technically may not fall within the terms of Rule 5(d)," but found "no abuse of the discretion in the district court's order in light of the district court's broad supervisory authority in class actions" (Pet. App. 78a). The court found "little sense" in allowing "access to documents requesting inspection of discovery materials and documents facilitating the inspection of discovery materials, without allowing access to the discovery materials themselves" *(id.)*, adding that the companies could still withhold specific records upon a showing of "good cause" (Pet. App. 78a-79a). While this decision may raise a question of whether, on the facts of this case, the district court properly ordered the filing and unsealing of non-confidential Rule 34 materials, that issue is at best a minor facet of the case and is not an important question of federal law which needs to be decided by this Court.

Petitioners also argue (at 13-15) that the decision below conflicts with other federal appellate decisions which require the moving party to demonstrate in some instances that an "extraordinary circumstance" or "compelling need" exists before a seal will be lifted. However, the appellate cases which they cite on this issue all come from the Second Circuit. The panel found no inconsistency with that court's prior decisions, and no member of the full court thought that the case deserved *en banc* review. Petitioners cannot invoke this Court's jurisdiction to resolve what they perceive to be an intra-circuit dispute.

3. Petitioners' final claim is largely a rehash of its earlier points. They argue (at 15-17) that the Court should

exercise its supervisory power because the decision below will impede discovery and discourage settlements. The point is answered in large part by the record here: the district court repeatedly informed the parties that the protective orders were temporary and lifted them on two prior occasions without detriment to the case moving towards trial and eventual settlement.

Nor can it be said that the decision below "has so far departed from the accepted and usual course of judicial proceedings" that this Court should intervene. S. Ct. Rule 17.1(a). Indeed, the Manual for Complex Litigation warns district judges to "be wary of approving" settlement proposals requiring that sealed records be returned to the parties which produced them, citing the "potential effect [of such orders] on other litigants and courts," but adding that it is proper to continue a seal on any commercially sensitive documents. Manual for Complex Litigation, Second § 23.22, at 170 (West, 1985) (footnote omitted). That is precisely what the district court did here.

Nor is there any reason to believe that the decision below will discourage settlements. Unsealing motions turn on the facts of each case. The district court was persuaded to modify these seals based on the facts here, and other courts will decide similar motions based on the facts there. Moreover, the ruling here was unanimously upheld by a federal appeals court which has taken a leading role in efforts to encourage settlements and reduce litigation. Surely, if the Second Circuit was satisfied with the district court's handling of this matter, this Court need not exercise its supervisory power to review that judgment.

Finally, we note that three years have come and gone since VVA first raised this issue. Petitioners have never suggested that this unsealing order would impel them to walk away from the settlement, a fact which suggests that

the court of appeals was correct in its assessment that this issue was, at best, an "incidental" element of the overall settlement (Pet. App. 74a).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

THE DOW CHEMICAL COMPANY, et al.,

Petitioners,

v.

MICHAEL RYAN, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

Summary of the Argument

Respondent has made no attempt to justify the decision below on the grounds relied upon by the Court of Appeals. Instead of confronting the serious issues concerning Federal Rule of Civil Procedure 26(c) raised by the Court of Appeals and the Petition, Respondent attempts to evade those issues by arguing the facts of the case. Unable to deny that the decision below is likely to cause serious problems for the civil discovery system, Respondent merely suggests that this Court need not concern itself with these problems.[1]

[1] The need for review has been intensified by the filing of another petition for certiorari raising substantially the same Rule 26(c) issues only two months after the filing of the petition in this case. *See Liggett Group, Inc.* v. *Cippollone*, No. 87-564.

Argument

I.

Respondent Bases Its Position on a Series of Unsupported Factual Assertions That Fail to Respond to the Issues Raised by the Petition.

The Court of Appeals did not cite any authority to support its holding that any non-party has a presumptive right of access to any discovery documents in any case without any showing of need. Respondent likewise does not cite any authority to support the Court of Appeals' interpretation of Rule 26(c), and does not deny that this holding is troubling. *See* Brief for Respondent at 11. Indeed, Respondent avoids any discussion of the Court of Appeals' unprecedented interpretation of Rule 26(c) and opts, instead, to try to convince the Court that the Petition merely raises questions of fact. The factual matters raised in Respondent's brief are not relevant to the issues raised in the Petition.

Respondent makes three unsupported factual assertions in response to Petitioners' argument that the decision below misinterpreted Rule 26(c). Respondent claims: first, that it is not a non-party; second, that the problems created by the decision below might not be as bad as Petitioners suggest; and third, that regardless of how Rule 26(c) is interpreted, Respondent should be entitled to the documents. Brief for Respondent at 11.

The VVA's status as a non-party amicus in the *Agent Orange* proceedings was decided when its motion to intervene was denied.[2] The VVA did not dispute its role as a

[2] The VVA moved to intervene on April 25, 1984. The motion was denied during oral argument on May 4, 1984.

non-party amicus below, and certainly cannot do so now before this Court. In any event, when the Court of Appeals created a public right of access, *In re "Agent Orange" Product Liability Litigation,* 821 F.2d 139, 145-46 (2d Cir. 1987), and Respondent stated below that the issue was whether "the public" has a right of access (Brief for Appellee VVA at 1), the VVA's status is not in any way relevant.

Respondent's argument that the problems created by the decision below might not be so serious is a tacit admission that the decision will create such problems. Respondent argues that this Court should not be concerned by these problems. Instead, it should wait and see how lower federal courts deal with the problems before solving them. Brief for Respondent at 11. The wiser course, however, would be to avoid such problems in the first instance.

Respondent further suggests that regardless of what rule is applied, Respondent would be entitled to the documents. If the District Court or the Court of Appeals had so held, Petitioner would clearly have no grounds to petition this Court. However, the Court of Appeals did not consider any approach to Rule 26(c) other than its unprecedented misinterpretation of that Rule. This Court's role is not to speculate about how the correct rule may be applied to these facts. *See, e.g., United States* v. *Johnston,* 268 U.S. 220, 227 (1925) ("We do not grant a certiorari to review evidence and discuss specific facts."). We respectfully submit that this Court should correct the rule and let the district court deal with applying the law to the facts.

II.

Respondent's Attempt to Distinguish *Seattle Times* Ignores Essential Elements of the *Seattle Times* Court's Reasoning.

Respondent suggests that the direct conflict between the reasoning of the Court of Appeals in this case and the reasoning of this Court in *Seattle Times* does not present the sort of conflict this Court ought to be concerned with. Brief for Respondent at 9-10. Respondent's argument simply ignores the fact that the *Seattle Times* Court's analysis of Rule 26(c) was central to its decision and is central to the civil discovery system. To determine whether to permit public dissemination of discovery materials, the *Seattle Times* Court needed to examine the purpose of Rule 26(c) and whether public dissemination ought to be the rule or the exception. *Seattle Times Co.* v. *Rhinehart*, 467 U.S. 20, 33-36 (1984). The Court of Appeals and the *Seattle Times* Court are in direct conflict on these issues. This conflict, as well as the problems that are likely to result from the creation of a public right of access to any discovery documents in any case without any showing of need, are issues that urgently need resolution by this Court.

Conclusion

The writ of certiorari should be granted.

Dated: Uniondale, New York
November 5, 1987

Respectfully submitted,

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